35A Am. Jur. 2d Fish, Game, and Wildlife Conservation Summary

American Jurisprudence, Second Edition | May 2021 Update

Fish, Game, and Wildlife Conservation
Karl Oakes, J.D.

Correlation Table

Summary

Scope:
This article discusses various aspects of the law of fish and game, including property rights in fish and game, the right to fish and to hunt game in private and public lands and waters, the acquisition and incidents of such rights and injuries and remedies thereto, and governmental regulation of the right to hunt and possess game and to fish. (The term "fish" is construed to include the different kinds of shellfish, such as oysters, clams, and lobsters.) Also treated in this article are some of the major federal statutes concerned with the conservation of wildlife through protection of wild animals and plants and their habitats.

Federal Aspects:
Federal statutes discussed in this article include the Airborne Hunting Act, the Atlantic Coastal Fisheries Cooperative Management Act, the Atlantic Tunas Convention Act of 1975, the Bald and Golden Eagle Protection Act, the Dolphin Protection Consumer Information Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the International Dolphin Conservation Act, the Lacey Act, the Magnuson Fishery Conservation and Management Act, the Marine Mammal Protection Act, the Marine Protection, Research, and Sanctuaries Act, the Migratory Bird Treaty Act, the National Aquaculture Act, the North Pacific Anadromous Stocks Act, the Northwest Atlantic Fisheries Convention Act, the Pacific Salmon Treaty Act, the Tuna Conventions Act of 1950, the Western and Central Pacific Fisheries Convention Implementation Act, and the Wild Bird Conservation Act.

Treated Elsewhere:
Accidental shooting of person by hunter, liability for, see Am. Jur. 2d, Weapons and Firearms § 45

Animals, generally, see Am. Jur. 2d, Animals §§ 1 et seq.

Coastal Zone Management Act, see Am. Jur. 2d, Pollution Control §§ 1034, 1035

Criminal law, generally, see Am. Jur. 2d, Criminal Law §§ 1 et seq.

Indians' rights to hunt and fish, see Am. Jur. 2d, Indians, Native Americans §§ 58 to 61

Pollution control, generally, see Am. Jur. 2d, Pollution Control §§ 1 et seq.

Works.

35A Am. Jur. 2d Fish, Game, and Wildlife Conservation I Refs.

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I. Property in Fish and Game

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Fish 1, 2

West's Key Number Digest, Game 1, 2

A.L.R. Library

A.L.R. Index, Fish and Game
West's A.L.R. Digest, Fish 1, 2
West's A.L.R. Digest, Game 1, 2

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I. Property in Fish and Game

§ 1. Property in fish and game, generally, ownership or title

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 1, 2

West's Key Number Digest, Game 1, 2

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Validity, Construction, and Application of State Statutes Prohibiting, Limiting, or Regulating Fishing or Hunting in State by Nonresidents, 31 A.L.R.6th 523

Validity, Construction, and Application of Migratory Bird Treaty Act, 16 U.S.C.A. secs 703 to 712, and its Implementing Regulations, 3 A.L.R. Fed. 2d 465

Whether there is a property interest in wildlife is a matter of state law.[1] As long as fish and game are in a state of freedom, and in particular before they are taken and reduced to possession, the right of ownership is considered common to all the people and cannot be claimed by any particular individuals.[2] In other words, the ownership of fish and game, so far as they are capable of ownership, until reduced to actual possession,[3] at a time and in a manner permitted by law,[4] is in the state.[5] As long as a wild animal remains wild, unconfined, and undomesticated it belongs to the state and no individual property rights exist.[6] At the same time though, the state has no such property interest in fish in a state of freedom as will support an action in trespass for monetary damages.[7]

The governmental power to regulate fishing and hunting is largely based on this public ownership, for the right of the individual to take title to fish and game is a qualified one in that it is a privilege granted by the state, and may be taken away or limited as the state sees fit.[8] In regulating fisheries, the state is merely enacting legislation concerning its own property and prescribing the methods which may be used in acquiring it by private persons.[9] Since fish are ferae naturae they are subject to ownership only by possession and control; no citizen has any right to fish nor to exclude any other citizen from equal opportunity to exercise their right to possession.[10] Moreover, since ownership of game is in the state, individuals have no proprietary interest in illegally obtained or possessed game and state agents may take the illegally obtained game from possession of individuals without such taking constituting a confiscation of property.[11]

Footnotes

[1] State v. Butler, 587 So. 2d 1391 (Fla. 3d DCA 1991).

[2] Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936).

[3] Madison Street Fishery, LLC v. Zehringer, 2017-Ohio-992, 86 N.E.3d 914 (Ohio Ct. App. 6th Dist. Erie County 2017).

[4] Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R.2d 370 (1954) (fish in a stream).

[5] Madison Street Fishery, LLC v. Zehringer, 2017-Ohio-992, 86 N.E.3d 914 (Ohio Ct. App. 6th Dist. Erie County 2017).

[6] Arroyo v. State of California, 34 Cal. App. 4th 755, 40 Cal. Rptr. 2d 627 (2d Dist. 1995) (California law deems wild animals to be owned by people of state and wild game cannot be confined to private lands); Nicholson v. Smith, 986 S.W.2d 54 (Tex. App. San Antonio 1999).
As to qualified interest of property owners in game on their property, see § 5.
As to fish in private waters, see § 6.
As to hunting and fishing rights of landowners, see § 20.

[7] Com. v. Agway, Inc., 210 Pa. Super. 150, 232 A.2d 69 (1967).

[8] State ex rel. Visser v. State Fish and Game Commission, 150 Mont. 525, 437 P.2d 373 (1968).

[9] Washington Kelpers Ass'n v. State, 81 Wash. 2d 410, 502 P.2d 1170 (1972) (abrogated on other grounds by, Yim v. City of Seattle, 194 Wash. 2d 682, 451 P.3d 694 (2019)).
As to regulation of fishing and hunting by the state, see §§ 30 to 34.

[10] Tlingit and Haida Indians of Alaska v. U. S., 182 Ct. Cl. 130, 389 F.2d 778 (1968).

[11] Aikens v. State Dept. of Conservation, 387 Mich. 495, 198 N.W.2d 304 (1972); State v. Pollock, 914 S.W.2d 1 (Mo. Ct. App. W.D. 1995).

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I. Property in Fish and Game

§ 2. What are fish and game

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 2

West's Key Number Digest, Game 2

Fish and game are generally animal life which are ferae naturae or wild[1] and are distinguished from domesticated animals,[2] as well as animals held in captivity.[3] Thus, a fox is a "wild animal" within the meaning of a state statute applying to game.[4] Lobsters are animals ferae naturae, and those which inhabit the public waters of the state are the common property of the people of the state until caught, at which time they belong to the captor.[5]

For purposes of regulating their taking, some forms of marine life may be distinguished based on their nature, such as clams, mussels, and other sedimentary or burrowing mollusks which are not "wild."[6] Moreover, a "unit of marine life," within the meaning of a statute defining the penalty for taking, harvesting, or possession of an endangered or threatened species, did not include marine turtle eggs since turtle eggs were not fish, salt water products, shell fish or live specimens.[7]

Only the legislature may designate a species of animal as game.[8]

While privately held animals kept in captivity are distinguished from wildlife or game, if they are released into the wild or allowed to roam away from captivity, and by nature they are wild, they may regain their status as an animal ferae naturae.[9] Thus, while an unqualified property right in wild animals may arise when they are legally removed from their natural liberty and made subjects of man's dominion, that right is lost if the animal regains its natural liberty.[10] However, a domestic animal escaping from its corral onto public lands does not become a "wild free-roaming animal."[11]

Footnotes

1 Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936).
As to definitions and classifications of animals, generally, see Am. Jur. 2d, Animals §§ 1, 2.

2 Dieterich v. Fargo, 194 N.Y. 359, 87 N.E. 518 (1909).

[3] Wiley v. Baker, 597 S.W.2d 3 (Tex. Civ. App. Tyler 1980).

[4] Barbour Fur Co., Inc. v. North Carolina Wildlife Resources Commission, 40 N.C. App. 609, 253 S.E.2d 323 (1979).

[5] State v. Kofines, 33 R.I. 211, 80 A. 432 (1911).

[6] U.S. v. Long Cove Seafood, Inc., 582 F.2d 159 (2d Cir. 1978).

[7] Bivens v. State, 586 So. 2d 442 (Fla. 4th DCA 1991).

[8] Michigan Audubon Soc. v. Natural Resources Com'n, 206 Mich. App. 1, 520 N.W.2d 353 (1994).

[9] Wiley v. Baker, 597 S.W.2d 3 (Tex. Civ. App. Tyler 1980).
As to property rights in wild animals, generally, see Am. Jur. 2d, Animals §§ 11 to 15.

[10] State v. Bartee, 894 S.W.2d 34 (Tex. App. San Antonio 1994).

[11] U.S. v. Christiansen, 504 F. Supp. 364 (D. Nev. 1980).

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I. Property in Fish and Game

§ 3. Fish and game reduced to possession

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West's Key Number Digest

West's Key Number Digest, Fish 1, 2

West's Key Number Digest, Game 1, 2

Fish and game lawfully reduced to possession generally become the property of the person in lawful possession,[1] subject to state regulation.[2] Since the ownership of fish and game is in the first instance lodged in the people of the state, it may be reserved by them, or they may permit individuals to acquire ownership of, or title to, such as is reduced to possession, subject to such conditions and limitations as the people, acting through their legislative agents, may, within constitutional limits, wish to impose.[3] Thus, ownership of wild animals remains in the state and is not subject to private ownership except as may be provided by state law,[4] and generally there is no individual property or ownership in fish or game so long as they remain wild, unconfined, and in a state of nature.[5] However, as soon as fish or game are reduced to the possession of a fisherman or hunter lawfully taking them, their ownership passes to the possessor.[6] Conversely, one can acquire no title to fish or game which have been caught or taken unlawfully, and even if taken lawfully, one cannot convey title if such sale is prohibited by statute.[7] Thus, all wildlife belongs to the state until taken and possessed in compliance with the law and only then does it belong to its captor.[8]

Fish belong to the state and commercial fishermen may acquire only such right to possession or ownership of fish as the state may allow; thus, for such fishermen to be in lawful possession of the fish, it is imperative that they comply with the regulations which the state has promulgated under the authority of its police power.[9] If a person, after capturing fish, confines them in a private pond disconnected from public waters, he or she acquires an absolute property in them subject to be divested only by their escape.[10] A fisherman need not withdraw the fish from the water in order for his or her private ownership to attach. If he or she encloses fish in a net from which he or she may take them at his or her pleasure, and from which it is practically, but not absolutely, impossible for them to escape, he or she has acquired a title in them.[11]

In the absence of a statute to the contrary, if one obtains ownership of wild game by capture and confinement, for so long as the animal is kept confined ownership is not dependent on domesticating the animal.[12] If the animal escapes from the possessor's control, the title is lost and ownership of the state in the animal is resumed.[13]

The pursuit of game gives no title thereto. Consequently, unless a hunter mortally wounds wild game or has it in such a situation that its escape is improbable, if not impossible, no action will lie against another who takes or kills game in front of such hunter after he or she has wounded and pursued it.[14]

Footnotes

[1] Department of Natural Resources v. Keating, 238 Ga. 605, 234 S.E.2d 519 (1977); Madison Street Fishery, LLC v. Zehringer, 2017-Ohio-992, 86 N.E.3d 914 (Ohio Ct. App. 6th Dist. Erie County 2017) (fish).

[2] Department of Natural Resources v. Keating, 238 Ga. 605, 234 S.E.2d 519 (1977).

[3] State v. Pollock, 42 S.D. 360, 175 N.W. 557 (1919).

[4] Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2000) (applying Rhode Island law); State ex rel. Visser v. State Fish and Game Commission, 150 Mont. 525, 437 P.2d 373 (1968).

[5] U.S. v. Long Cove Seafood, Inc., 582 F.2d 159 (2d Cir. 1978).

[6] Dapson v. Daly, 257 Mass. 195, 153 N.E. 454, 49 A.L.R. 1496 (1926); Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

[7] People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186 (1925).

[8] Department of Natural Resources v. Keating, 238 Ga. 605, 234 S.E.2d 519 (1977).

[9] Aikens v. Conservation Dept., 28 Mich. App. 181, 184 N.W.2d 222 (1970), judgment rev'd on other grounds, 387 Mich. 495, 198 N.W.2d 304 (1972).

[10] Murphy v. Hitchcock, 22 Haw. 665, 1915 WL 1421 (1915).

[11] State v. Shaw, 67 Ohio St. 157, 65 N.E. 875 (1902).

[12] Schultz v. Morgan Sash & Door Co., 1959 OK 149, 344 P.2d 253, 74 A.L.R.2d 967 (Okla. 1959).

[13] Koop v. U.S., 296 F.2d 53 (8th Cir. 1961).
As to the effect of escape of wild animals from confinement, generally, see Am. Jur. 2d, Animals § 15.

[14] Dapson v. Daly, 257 Mass. 195, 153 N.E. 454, 49 A.L.R. 1496 (1926).

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I. Property in Fish and Game

§ 4. Effect of location of fish and game on ownership thereof

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 1, 2

West's Key Number Digest, Game 1, 2

The state, in its sovereign capacity, owns the fish in tidewaters within its jurisdiction,[1] and its coastal waters,[2] as well as fish and game in its navigable waters, and the state's ownership extends to fish in all waters of which the underlying lands are not in private ownership.[3] In some jurisdictions, statutes reflecting the common-law principle that fish which are ferae naturae are the property of the state do not apply to fish located in bodies of water that are totally within private property and totally separate from any other body of water, in which the owner of property owns fish therein.[4]

A state does not have an exclusive legal right to the anadromous fish hatched in its waters as opposed to the rights of the other states sharing the same waterways. The state does have an equitable right to a fair distribution of this important resource in relation to the other states, since at the root of the doctrine of equitable apportionment is the principle that a state may not preserve solely for its own inhabitants natural resources located within its borders, and consistent with this principle, the states have an affirmative duty under the doctrine to take reasonable steps to conserve and even augment the natural resources within the borders for the benefit of the other states.[5] Since the ownership of fish is in the state in trust for all its people, a municipality cannot claim, for the benefit of that portion of the people of the state constituting such municipality's inhabitants, any proprietary interest in the fish within the limits of the municipality.[6]

Footnotes

1 Dodgen v. Depuglio, 146 Tex. 538, 209 S.W.2d 588 (1948).

2 People v. Brady, 234 Cal. App. 3d 954, 286 Cal. Rptr. 19 (1st Dist. 1991).

3 Shaughnessy v. PPG Industries, Inc., 795 F. Supp. 193 (W.D. La. 1992); Tyrrell Gravel Co. v. Carradus, 250 Ill. App. 3d 817, 189 Ill. Dec. 318, 619 N.E.2d 1367 (2d Dist. 1993); Com. v. Tart, 408 Mass. 249, 557 N.E.2d 1123 (1990).

4 Tyrrell Gravel Co. v. Carradus, 250 Ill. App. 3d 817, 189 Ill. Dec. 318, 619 N.E.2d 1367 (2d Dist. 1993).

For discussion of fish in private waters, see § 6.

[5] Idaho ex rel. Evans v. Oregon, 462 U.S. 1017, 103 S. Ct. 2817, 77 L. Ed. 2d 387 (1983).

[6] Ex parte Bailey, 155 Cal. 472, 101 P. 441 (1909).

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I. Property in Fish and Game

§ 5. Qualified interest of property owners in fish and game

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 1, 2

West's Key Number Digest, Game 1, 2

Wild game within a state is not the subject of private ownership, except in so far as the people may elect to make it so.[1] Status as the owner of land upon which animals ferae naturae are found is insufficient to confer individual property rights to the animals thereon.[2] Thus, landowners cannot claim a property interest in wild animals on their property.[3] Under the public trust doctrine, an animal must be legally removed from the wild before property rights can arise in it.[4] However, even though the title to fish and game is in the state in trust for the benefit of its citizens, the owner of premises whereon game is located has a qualified property interest in such game;[5] without his or her permission no other person can go upon those premises and take the game.[6] That is, the owner has a right to control and protect the game on his or her lands, subject to such regulations as may be made by the state.[7] Thus, while wild animals belong to all citizens of the state, they are also subject to interests in the nature of private ownership arising from ownership of the land on which they are found, such that one who owns land may hunt the game thereon; this private ownership does not conflict with the state's ownership, but must yield to the state's regulations.[8]

The conveyance of a hunting or fishing right cannot transfer ownership of wildlife. As the state owns the fish and game; a conveyance of hunting and fishing rights by property owners merely conveys a right to enter upon land for that purpose, which rights are normally classified as "profit a prendre."[9]

Footnotes

1 Bailey v. Smith, 581 S.W.3d 374 (Tex. App. Austin 2019), review denied, (Oct. 2, 2020).

2 Betchart v. Department of Fish & Game, 158 Cal. App. 3d 1104, 205 Cal. Rptr. 135 (1st Dist. 1984); Nicholson v. Smith, 986 S.W.2d 54 (Tex. App. San Antonio 1999).

3 Clajon Production Corp. v. Petera, 854 F. Supp. 843 (D. Wyo. 1994), aff'd in part, appeal dismissed in part, 70 F.3d 1566 (10th Cir. 1995).

[4] Bailey v. Smith, 581 S.W.3d 374 (Tex. App. Austin 2019), review denied, (Oct. 2, 2020).

[5] Mille Lacs Band of Chippewa Indians v. State of Minn., 152 F.R.D. 587 (D. Minn. 1993).

[6] § 20.

[7] McKee v. Gratz, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922).

[8] Nelson v. State, 318 Ark. 146, 883 S.W.2d 839 (1994).
As to regulation of hunting and fishing, see §§ 30 to 34.

[9] Mille Lacs Band of Chippewa Indians v. State of Minn., 861 F. Supp. 784 (D. Minn. 1994), aff'd, 124 F.3d 904 (8th Cir. 1997), judgment aff'd, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).
As to rights of landowners and acquisition of rights, see §§ 20 to 23.

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I. Property in Fish and Game

§ 6. Ownership of fish in private waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 1, 2

An owner's exclusive right to fish waters within the boundaries of the land owned is distinguishable from the ownership of fish within those waters; thus, it has been held that notwithstanding such exclusive right to fish there is no private ownership except as to those fish lawfully reduced to the land owner's possession.[1] In some jurisdictions, however, the landowner is deemed to own fish located in bodies of water that are totally within the private property and totally separate from any other body of water.[2] Thus, while generally the state owns the fish in all the waters within the state, private ponds which are privately stocked and not connected with public waters are an exception and those fish are the property of the respective property owner.[3]

Footnotes

1 State v. Southern Coal & Transp. Co., 71 W. Va. 470, 76 S.E. 970 (1912).

2 Tyrrell Gravel Co. v. Carradus, 250 Ill. App. 3d 817, 189 Ill. Dec. 318, 619 N.E.2d 1367 (2d Dist. 1993).

3 Ex parte Fritz, 86 Miss. 210, 38 So. 722 (1905).

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I. Property in Fish and Game

§ 7. Shellfish distinguished from fish for purposes of property rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 1, 2

West's Key Number Digest, Game 1, 2

The difference between the locomotive powers of swimming fish and shellfish, such as oysters and clams, justifies the law in making a distinction as to their ownership.[1] In their natural state, clams and oysters are classified as ferae naturae, and their ownership is vested in the state in its sovereign capacity,[2] but when planted where they do not naturally grow, in locations marked by posts or otherwise, they are classified as domestic animals and are the subjects of private ownership, although their owner has no greater actual possession than is evidenced by their planting and staking.[3] In the latter case, they may be the subject of larceny,[4] and if one injures or converts such shellfish, he or she is liable to respond in damages.[5]

Musselshells are the property of the owner of the land on which they are found in nonnavigable waters, although a statute declares that the title to fish and game is in the state.[6]

Footnotes

1 U.S. v. Long Cove Seafood, Inc., 582 F.2d 159 (2d Cir. 1978).

2 People v. Morrison, 194 N.Y. 175, 86 N.E. 1120 (1909).

3 Union Land Associates v. Ussher, 174 Or. 453, 149 P.2d 568 (1944).

4 U.S. v. Long Cove Seafood, Inc., 582 F.2d 159 (2d Cir. 1978) (unlike most wild animals, clams, mussels and other sedimentary or burrowing mollusks are deemed to be in possession of owner, if any, of land in which they are found, and taking them without permission of owner is larceny under state law); J. H. Miles & Co. v. McLean Contracting Co., 180 F.2d 789 (4th Cir. 1950).

5 Coos Bay Oyster Co-op. v. State, 219 Or. 588, 348 P.2d 39 (1959).

6 McKee v. Gratz, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922).

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II. Hunting and Fishing Rights

A. Overview

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

West's Key Number Digest, Game 2.5, 3
West's Key Number Digest, Water Law 1242

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

a. In General

§ 8. Hunting and fishing rights in public lands and waters, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

West's Key Number Digest, Game 2.5, 3
West's Key Number Digest, Water Law 1242

The right of an individual to take fish and game is a qualified one in that it is a privilege granted by the state,[1] and may be taken away or limited as the state sees fit.[2] Thus, the right to take fish or game is subject to such conditions and limitations as the state legislature may, within constitutional limits, impose.[3] Furthermore, recreational hunting is not a fundamental right and regulations affecting the right to hunt do not impair fundamental constitutional rights.[4]

An artificial change in a river and its bed will not affect the public nature of the waters and will not take away the right of the public to use them for fishing.[5]

Public rights such as the right of navigation on the waters of a stream or lake, whether the bed is privately or publicly owned, and the similar right of fishing and hunting over navigable waters, sometimes restricted to water publicly owned, are public easements.[6]

Footnotes

1 State ex rel. Visser v. State Fish and Game Commission, 150 Mont. 525, 437 P.2d 373 (1968); Unified Sportsmen of Pennsylvania ex rel. their Members v. Pennsylvania Game Commission (PGC), 18 A.3d 373 (Pa. Commw. Ct. 2011) (right to hunt game).
As to ownership of fish game residing in the state or the people, not individuals, until reduced to possession, see § 3.

[2] State ex rel. Visser v. State Fish and Game Commission, 150 Mont. 525, 437 P.2d 373 (1968).

[3] Aikens v. Conservation Dept., 28 Mich. App. 181, 184 N.W.2d 222 (1970), judgment rev'd on other grounds, 387 Mich. 495, 198 N.W.2d 304 (1972).

[4] Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988); U.S. v. Romano, 929 F. Supp. 502 (D. Mass. 1996).
Nonresident landowners do not have a right to hunt wildlife on their land that is sufficiently fundamental to trigger the protections of the Privileges and Immunities Clause of Federal Constitution with respect to a statute distinguishing between resident and nonresident landowners for the purposes of granting special hunting privileges; the legislature extinguished any common-law right to hunt on one's own land through an extensive statutory scheme concerning wildlife within the state borders and regulating the manner, places, and times in which certain species of wildlife may be taken and in what numbers. Democko v. Iowa Dept. of Natural Resources, 840 N.W.2d 281 (Iowa 2013).

[5] Port Acres Sportsman's Club v. Mann, 541 S.W.2d 847 (Tex. Civ. App. Beaumont 1976), writ refused n.r.e.

[6] Delmarva Power & Light Co. of Md. v. Eberhard, 247 Md. 273, 230 A.2d 644 (1967).

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

a. In General

§ 9. Right to hunt and trap from boats

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

West's Key Number Digest, Game 2.5, 3

The right to hunt and trap from boats on rivers, lakes, streams, and the like, is analogous to the right to take fish from the water. As a general rule, the test as to the public right of fowling, hunting, and trapping is the public or private ownership of the soil beneath the waters.[1] Where the state owns the soil beneath waters, the public has a right to resort to such public waters and hunt or trap.[2] The public has a right to row a boat upon navigable waters the soil under which is owned by the state, but which flows through private property, and to shoot and trap, so long as it does not trespass upon the adjacent property.[3]

Footnotes

1 State ex rel. State Game Commission v. Red River Valley Co., 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421 (1945).

2 Meredith v. Triple Island Gunning Club, 113 Va. 80, 73 S.E. 721 (1912).

3 Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907).

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

a. In General

§ 10. Right to fish or hunt distinguished from ownership of fish or game

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

West's Key Number Digest, Game 2.5, 3

The right to hunt or fish is separate from the right to the game or the fish,[1] thus individuals have no property right in fish or game until they are lawfully reduced to possession,[2] ownership of wild animals remaining in the state except as the state chooses to allow them to be taken.[3] The pursuit of game does not effect a change in the right of ownership until the game is actually taken. Thus, the hunter's right to pursue does not become a right of ownership until the hunter has mortally wounded the animal or has it in such a situation that its escape is improbable, if not impossible.[4]

Footnotes

1 Tlingit and Haida Indians of Alaska v. U. S., 182 Ct. Cl. 130, 389 F.2d 778 (1968).
As to ownership or property rights in fish and game, see § 1.

2 § 3.

3 State ex rel. Visser v. State Fish and Game Commission, 150 Mont. 525, 437 P.2d 373 (1968).
The ownership of fish and game, so far as they are capable of ownership, until reduced to actual possession, is in the state, and their protection and preservation by the state has always been regarded and treated as within the proper domain of its police power. Madison Street Fishery, LLC v. Zehringer, 2017-Ohio-992, 86 N.E.3d 914 (Ohio Ct. App. 6th Dist. Erie County 2017).
As to regulation of hunting and fishing, see §§ 30 to 34.

4 Dapson v. Daly, 257 Mass. 195, 153 N.E. 454, 49 A.L.R. 1496 (1926).

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

a. In General

§ 11. Interference with right to hunt and fish; priority of right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

West's Key Number Digest, Game 2.5, 3

States may protect the public's right to hunt and the lawful taking of wildlife by limiting harassment of hunters by animal rights activists or others seeking to physically interfere with lawful hunting.[1] The title to public trust waters is held in trust for the people of the state, so that they may enjoy navigation of waters, carry on commerce over them, and have liberty of fishing therein, freed from obstruction or interference of private parties.[2] State law may also protect the public's right to enter commercial forestlands to exercise the privilege of hunting or fishing without interference.[3] Statutes prohibiting interference with hunting, fishing, and predator control must otherwise satisfy constitutional requirements such that they must not be unconstitutionally overbroad or prohibit protected speech. Thus, where a statute proscribes interference but does not require physical interference it may not pass constitutional muster.[4]

However, as between fishermen, there is no priority of rights to fish in a particular area and each fisherman owes the other a duty of care.[5] The public right to fish in navigable waters of the state is common to all of its citizens, and even a riparian owner has no right to fish in navigable waters superior to that of any other citizen, in the absence of express grant or prescriptive right.[6] The right to fish in navigable waters of the state necessarily includes the right to anchor temporarily and to wade but that does not include a right to walk upon banks of the river or to tie a boat or line to an object upon the shore to facilitate fishing in those waters,[7] and similarly, the right to fish in navigable waters does not carry with it a right to trespass upon the land of the riparian owner.[8] However, it has been held that the mooring of three boats by a defendant on his privately held tidal flats was not such exercise of his rights to use the land as to constitute interference with the public's reasonable use of the area for shellfishing.[9]

The members of the public have standing to complain of unauthorized and unreasonable uses or methods of diversion of water which interfere with the right to fish.[10]

Footnotes

1 Binkowski v. State, 322 N.J. Super. 359, 731 A.2d 64 (App. Div. 1999).

2 RJR Technical Co. v. Pratt, 339 N.C. 588, 453 S.E.2d 147 (1995).

3 Goodall v. Whitefish Hunting Club, 208 Mich. App. 642, 528 N.W.2d 221 (1995).

4 State v. Casey, 125 Idaho 856, 876 P.2d 138 (1994).

5 CEH, Inc. v. F/V Seafarer (O.N. 675048), 880 F. Supp. 940 (D.R.I. 1995), aff'd, 70 F.3d 694 (1st Cir. 1995); Dycus v. Sillers, 557 So. 2d 486 (Miss. 1990).

6 People v. Dunn, 159 Misc. 2d 536, 610 N.Y.S.2d 121 (App. Term 1993).

7 Douglaston Manor, Inc. v. Bahrakis, 218 A.D.2d 300, 639 N.Y.S.2d 613 (4th Dep't 1996), order rev'd on other grounds, 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997).

8 Michigan United Conservation Clubs v. Board of Trustees of Michigan State University, 172 Mich. App. 189, 431 N.W.2d 217, 50 Ed. Law Rep. 161 (1988).

9 Town of Wellfleet v. Glaze, 403 Mass. 79, 525 N.E.2d 1298 (1988).

10 Golden Feather Community Assn. v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276, 257 Cal. Rptr. 836 (3d Dist. 1989).
As to injury to hunting and fishing rights, generally, see §§ 24 to 26.

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

a. In General

§ 12. Acquisition of exclusive right to fish by grant

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

The right of ownership of the soil and the right of fishing in the waters thereover are not necessarily coextensive. Where the state owns the soil under navigable waters, it may convey merely the soil without an exclusive right of fishery; in such a case, the grantee takes the soil subject to the piscatory rights of the public.[1] A grant of the soil will ordinarily not be construed to convey the fishing rights unless the intention to do so is so clearly and fully expressed that the grant is incapable of any other reasonable construction.[2]

Footnotes

1 State v. Leavitt, 105 Me. 76, 72 A. 875 (1909); Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).

2 Carter v. Territory of Hawaii, 200 U.S. 255, 26 S. Ct. 248, 50 L. Ed. 470 (1906); Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

a. In General

§ 13. Acquisition of exclusive right to fish by prescription

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

The public has an important interest in areas which have been traditionally used by the public for fishing and recreational activities for more than a century.[1] However, since the theory of prescriptive rights presumes the existence of a grant which has become lost through lapse of time,[2] if the right could not have been procured by grant, a grant cannot be presumed, and use will confer no exclusive rights.[3] Absent the right of the state to grant an exclusive fishery, such a fishery cannot be acquired by prescription, for the exercise of the right of fishing in public waters cannot be exclusive. Its exercise, no matter by whom or for what length of time, is only the lawful exercise of a public right.[4] The fact that a shore owner has the exclusive right to fish to the middle of a navigable stream opposite his or her land is unavailable as a means of acquiring an exclusive fishery within the limits prescribed although he or she has cleared out a fishing place in the bed of the stream.[5]

Footnotes

1 Smith v. State, 153 A.D.2d 737, 545 N.Y.S.2d 203 (2d Dep't 1989).

2 Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).

3 Slingerland v. International Contracting Co., 169 N.Y. 60, 61 N.E. 995 (1901).

4 Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).

5 Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

b. Particular Locations

§ 14. Rights to fish in navigable waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

The public has a prima facie right to fish in all navigable streams, just as it has in other public waters, even though the beds thereof may be owned by the riparian owners.[1] The term "navigable waters" in a statute providing that people have the right to catch fish in any of the navigable waters of the state includes those waters which are suitable for public recreational use.[2]

With respect to the grant of a fee interest in the lands under navigable waters, the public right of navigation and fishery supersedes the private right.[3] A plaintiff, although owning land to the center of a navigable river, and owning both sides and the entire soil underwater, did not, as the riparian owner, own the water or the fish in the water. Thus, the general public who might have had access to the river without trespassing on the upland of plaintiff could fish the river.[4] Furthermore, a riparian owner, merely as such, has no exclusive right to a fishery in tidal or navigable waters.[5] Hence, a stranger has a right to row a boat upon navigable streams flowing through private property and to take fish from the water,[6] provided he or she does not trespass on the adjacent property.[7] A right to fish in navigable waters does not carry with it the right to trespass upon the land of a riparian owner.[8] A person who legally accesses a watercourse, and fishes from within a boat on the watercourse, cannot be convicted of violating a statute prohibiting fishing on private property without the consent of the owner, as the public has an easement in the use of the waterway. Thus, the person has a constitutional and statutory right to be there.[9]

However, the public easement of navigation does not of itself sustain a common right of fishing in the waters.[10] Accordingly, the improvement of a river so as to change it from the nonnavigable to the navigable class of waters does not necessarily give the public a common right of fishery in the water, even though such a change may afford the public an easement of navigation along the stream.[11]

Where lands have, as the result of an avulsion, become submerged to a depth satisfying the requirements of navigability, the owner does not lose title to the submerged lands then constituting part of the stream bed and has the right to drain off the water and reclaim the land at any time, but in the absence of such reclamation the public has the right to fish in these waters,

because of their acquired navigable character, without let or license from the owner.[12]

Where flooding may physically allow navigation of a stream not otherwise navigable except during periods of flooding, individual members of the public have no right to fish in it or navigate it during times of flooding absent permission from the landowners.[13]

Observation:

The statutory right of the public to fish in a reservoir does not take precedence over public purposes which are incompatible with fishing.[14]

Footnotes

1 Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441 (1935).

2 Kelley ex rel. MacMullan v. Hallden, 51 Mich. App. 176, 214 N.W.2d 856 (1974).
As to definition of navigable waters and criteria for determining what waters are navigable, see Am. Jur. 2d, Waters §§ 135 to 150.

3 Smith v. State, 153 A.D.2d 737, 545 N.Y.S.2d 203 (2d Dep't 1989).

4 NeBoShone Ass'n v. State Tax Commission, 58 Mich. App. 324, 227 N.W.2d 358 (1975).

5 NeBoShone Ass'n v. State Tax Commission, 58 Mich. App. 324, 227 N.W.2d 358 (1975).

6 Lehigh Falls Fishing Club v. Andrejewski, 1999 PA Super 184, 735 A.2d 718 (1999).

7 NeBoShone Ass'n v. State Tax Commission, 58 Mich. App. 324, 227 N.W.2d 358 (1975); State ex rel. State Game Commission v. Red River Valley Co., 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421 (1945).

8 Michigan United Conservation Clubs v. Board of Trustees of Michigan State University, 172 Mich. App. 189, 431 N.W.2d 217, 50 Ed. Law Rep. 161 (1988).

9 State v. Head, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1997).

10 Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905).

11 Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905).

12 Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1st Dist. 1951).

13 Gollatte v. Harrell, 731 F. Supp. 453 (S.D. Ala. 1989).

14 Golden Feather Community Assn. v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276, 257 Cal. Rptr. 836 (3d Dist. 1989).

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

b. Particular Locations

§ 15. Rights to hunt and fish in navigable waters—Fisheries

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

A.L.R. Library

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 A.L.R.4th 1030

Generally the term "fishery" denotes a place for fishing. In a legal sense, however, it has a broader significance and may be defined as the right to employ, within a particular stretch of water, lawful means for the taking of fish which may be found there. It is to be distinguished from a fishing place or the right to use a particular shore or beach as the basis for carrying on the business; the latter is vested in the shore owner and is entirely distinct from the right to take fish from the water.[1]

The states hold interests in a fishery for the benefit of the public.[2] The people have a right to take fish from salt waters subject to regulations imposed by a state.[3] Thus, in the absence of any prescriptive right, or any grant or regulation by the state, there exists in the general public a common right to fish in all the arms of the sea and other public waters of the state,[4] and the public has a traditional right to fish from boats in navigable waters of the state.[5] Riparian owners along a navigable water, merely as such, have no prior or exclusive rights of fishing in such water.[6]

Footnotes

[1] Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).

[2] Com. v. Tart, 408 Mass. 249, 557 N.E.2d 1123 (1990).

[3] State v. Perkins, 436 So. 2d 150 (Fla. 2d DCA 1983).

[4] Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997); RJR Technical Co. v. Pratt, 339 N.C. 588, 453 S.E.2d 147 (1995).

[5] State v. Barras, 615 So. 2d 285 (La. 1993).

[6] § 21.

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

b. Particular Locations

§ 16. Use of shore to fish

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

The fact that all the members of the public have a common right of fishing in waters in front of an owner's premises gives them no right to trespass on his or her lands,[1] and as to that part of the shore which is above the high watermark, the right of the owner is exclusive.[2] Thus, while the public has a right to fish in navigable waters, that right may not go so far as to divest owners of adjacent banks of their exclusive rights to fisheries therein.[3] Also, a general member of the public, as such, has no right to construct a fish trap so as to interfere with the rights of a riparian owner to seine for fish in such waters and to interfere with access to his or her property.[4]

The general public, having fishing rights in tidewaters, may use the soil between the high and low watermarks for the purpose of landing nets and for other uses in aid of the fishing rights.[5] However, a person owning an upland island and the tidelands in front of that land within navigable waters may enjoin the construction of a "pound net" in front of the land for this would seriously impair the owner's right as a member of the public to seine for fish there, as well as the owner's exclusive right to draw the owner's seine upon the shores of the premises.[6]

The ownership of land along the banks of navigable rivers does not give the owner the exclusive right to fish in those rivers; that right is vested in the state and open to the public.[7]

Footnotes

[1] Michigan United Conservation Clubs v. Board of Trustees of Michigan State University, 172 Mich. App. 189, 431 N.W.2d 217, 50 Ed. Law Rep. 161 (1988).

[2] Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).

[3] Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997).

[4] Johnson v. Jeldness, 85 Or. 657, 167 P. 798 (1917).

[5] Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 72 P. 161 (1903).

[6] Johnson v. Jeldness, 85 Or. 657, 167 P. 798 (1917).

[7] Lehigh Falls Fishing Club v. Andrejewski, 1999 PA Super 184, 735 A.2d 718 (1999).

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

b. Particular Locations

§ 17. Rights to fish in coastal waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether for fish, pearls, amber, or other products of the sea.[1] Generally, the United States government has exclusive jurisdiction over the management of fishing rights beyond state boundaries which are limited to a three mile belt off the mainland shore; coastal channels and straits beyond the three mile belts off the mainland shores are outside the state boundaries and the states cannot regulate or limit fishing rights in those waters.[2] However, if a state's statutes purport to prescribe fishing activities in areas beyond its boundaries, persons whose conduct occurs within the state's territorial jurisdictional do not have standing to challenge the constitutionality and validity of the statute based on its purported prescription beyond its jurisdiction.[3]

Footnotes

1 State of Louisiana v. State of Mississippi, 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913 (1906).

2 People v. Weeren, 26 Cal. 3d 654, 163 Cal. Rptr. 255, 607 P.2d 1279 (1980).

3 State v. Hill, 372 So. 2d 84 (Fla. 1979).
As to regulation of hunting and fishing, see §§ 30 to 34.

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

b. Particular Locations

§ 18. Rights to fish in lakes and ponds

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

Although the owners of property surrounding small lakes and ponds control fishing rights in those waters, generally, and thus such waters are effectively closed to public fishing,[1] the public has a common right of fishery in larger lakes that are navigable in fact[2] as, for example, the Great Lakes[3] and the bays extending therefrom.[4] Indeed, the public has a right to fish in the waters of a navigable lake which has been stocked with fish by the state.[5]

Footnotes

1 § 21.

2 Conant v. Jordan, 107 Me. 227, 77 A. 938 (1910); Winous Point Shooting Club v. Slaughterbeck, 96 Ohio St. 139, 117 N.E. 162 (1917).

3 Winous Point Shooting Club v. Slaughterbeck, 96 Ohio St. 139, 117 N.E. 162 (1917) (the right of the public to fish in the waters of Lake Erie and its bays is as fixed and complete as if those waters were subject to the ebb and flow of the tide).

4 Winous Point Shooting Club v. Slaughterbeck, 96 Ohio St. 139, 117 N.E. 162 (1917).

5 Douglas v. Bergland, 216 Mich. 380, 185 N.W. 819, 20 A.L.R. 197 (1921).

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

b. Particular Locations

§ 19. Right to take shellfish

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

Generally title to shellfish in tidal waters is that of the state as representative of the people,[1] exercising not only rights of sovereignty but also property.[2] The public trust doctrine, under which the public retains an incidental right of fishing in navigable waterways, does not encompass the right to gather clams on private property.[3]

Although the state holds title to lands under navigable waters in public trust for the use and benefit of all its citizens, a state may permit the exclusive use of such lands by private individuals, that is, a franchise, for specific purposes, such as shellfishing.[4] Thus, a state may convey an exclusive right to harvest all shellfish on leased underwater land whether the shellfish be naturally grown or cultivated.[5]

In some coastal states, statutes have been passed permitting riparian owners along the sea to use exclusively certain areas of the waters for the cultivation of oysters.[6] Such statutes are generally valid, and the owners of oysters planted pursuant thereto will be protected in their ownership.[7] However, the privilege of locating oyster beds on public lands and of planting and taking oysters therefrom is merely a license revocable by the legislature.[8] It is also subject to the public's rights of navigation,[9] and if it interferes therewith, the oysters or clams may be removed as a nuisance.[10]

While some states are forbidden by their constitutions to lease natural shellfish beds,[11] in most jurisdictions the state is permitted to convey or lease clam or oyster beds to private individuals.[12] The grantee or lessee may acquire an exclusive right to plant and cultivate shellfish on the bed,[13] and others may be enjoined from interfering with such a bed.[14] Generally the leasing of water bottoms for oyster cultivation and renewal of those leases is discretionary with the appropriate state agency, it being for the agency to make a determination that those water bottoms are suitable for oyster cultivation.[15] While a shellfish lease, granting a lessee the absolute right to use and occupy grounds for the purpose of planting, growing, storing and harvesting clams, grants the particular lessee the exclusive right to take clams from the beds, excluding all others from such activity on the grounds, the lessee does not take fee simple title, nor can the lessee use the property for any other purpose

except that provided by the lease consistent with and pursuant to the statutory authority therefor; thus every other right generally belonging to the public is preserved.[16]

Observation:

The harvesting of live oysters was not a "mineral right" as defined by the mineral code which applied to the right to remove oyster shells. Thus, oyster leases were not subject to public bid. Although the shells were taken when the oysters were harvested, it was not pursuant to exercise of a mineral right and it was not the equivalent of shell dredging.[17]

A municipality is a "firm or corporation" that is eligible to receive transfers of oyster-planting ground leases under a state statute.[18] However, shellfishing grounds are not owned by a municipality in the absence of a granting of private rights, even if the legislature enables a municipality to lease or license shellfishing grounds located within its borders.[19]

Footnotes

1 Shoreline Shellfish, LLC v. Town of Branford, 2020 WL 4354902 (Conn. 2020); State v. Norton, 335 A.2d 607 (Me. 1975).

2 State v. Norton, 335 A.2d 607 (Me. 1975).

3 State v. Longshore, 97 Wash. App. 144, 982 P.2d 1191 (Div. 2 1999), aff'd, 141 Wash. 2d 414, 5 P.3d 1256 (2000).

4 Bryant v. Hogarth, 127 N.C. App. 79, 488 S.E.2d 269 (1997).

5 Murphy v. Long Island Oyster Farms, Inc., 112 A.D.2d 276, 491 N.Y.S.2d 721 (2d Dep't 1985).
As to leases granting right to take shellfish, see § 25.

6 Windsor v. State, 103 Md. 611, 64 A. 288 (1906); Newport News Shipbuilding & Dry Dock Co. v. Jones, 105 Va. 503, 54 S.E. 314 (1906).

7 Cain v. Simonson, 39 So. 571 (Ala. 1905).

8 Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).

9 Richardson v. U.S., 100 F. 714 (C.C.E.D. Va. 1900).

10 Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).

11 Commonwealth v. City of Newport News, 158 Va. 521, 164 S.E. 689 (1932).

12 Jurisich v. Hopson Marine Service Co., Inc., 619 So. 2d 1111 (La. Ct. App. 4th Cir. 1993); Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).

13 Murphy v. Long Island Oyster Farms, Inc., 112 A.D.2d 276, 491 N.Y.S.2d 721 (2d Dep't 1985).

14 Working Waterman's Ass'n of Virginia, Inc. v. Seafood Harvesters, Inc., 227 Va. 101, 314 S.E.2d 159 (1984).

15 Vujnovich v. Louisiana Wildlife and Fisheries Commission, 376 So. 2d 330 (La. Ct. App. 4th Cir. 1979).

16 Working Waterman's Ass'n of Virginia, Inc. v. Seafood Harvesters, Inc., 227 Va. 101, 314 S.E.2d 159 (1984).

[17] Jurisich v. Hopson Marine Service Co., Inc., 619 So. 2d 1111 (La. Ct. App. 4th Cir. 1993).

[18] City of Virginia Beach v. Virginia Marine Resources Commission, 70 Va. App. 68, 824 S.E.2d 506 (2019).

[19] Shoreline Shellfish, LLC v. Town of Branford, 2020 WL 4354902 (Conn. 2020).

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II. Hunting and Fishing Rights

A. Overview

2. In or on Private Lands and Waters

§ 20. Hunting and fishing rights in or on private lands and waters, generally; rights of landowners

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

West's Key Number Digest, Game 2.5, 3

A.L.R. Library

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 A.L.R.4th 1030

In private waters subject to the state's right of regulation[1] the exclusive rights of fishing, as well as the right to hunt or trap, belong to the owners of the soil beneath the waters.[2] The fact that the owner of a nonnavigable body of water renders it navigable does not cause the owner to lose any of the owner's exclusive rights,[3] although generally the public has a right to fish and hunt on navigable waters as an incident of the right to use the waters for the purposes of navigation, regardless of the ownership of the subaqueous soil.[4] Sound public policy requires that the state continue to hold its navigable waters in trust for the public, and that such trust extend to the uses of such waters for fishing, hunting, and other recreational purposes, as well as for pure navigation.[5]

Every landowner has an exclusive common-law right to kill or capture game on his or her own land, subject to the regulatory action of the state in the preservation of all game for the common use.[6] This right is regarded at common law as property ratione soli, or property by reason of the ownership of the soil.[7] A hunter may hunt on his or her own premises even though the supply of game on the neighbor's lands is thereby lessened.[8]

The trespass of a hunter in pursuit of game on another's premises may be made a crime,[9] and although the hunter may have

been standing in a place where there was a legal right to be, the hunter has no right to shoot over the premises of an adjoining owner or to go onto the premises of another to get game which has fallen there,[10] unless the owner gives the hunter permission to do so.[11] State statutes may, however, allow entry into agricultural land not posted "no trespassing" for the purpose of retrieving wounded game.[12] The term "owner of land," within statutes penalizing hunting over property without the consent of the owner, embraces a natural person, a corporation, or a quasi person or entity such as a partnership, and includes one who owns an undivided fractional interest in land, one who is in possession under a parol contract of purchase, and, under some statutes, one who owns the rights over lands.[13]

Footnotes

1 § 40.

2 State v. Taylor, 358 Mo. 279, 214 S.W.2d 34 (1948); State ex rel. State Game Commission v. Red River Valley Co., 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421 (1945).
As to ownership and control of natural bodies of water, generally, see Am. Jur. 2d, Waters §§ 121 to 129.

3 Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912).

4 Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997).
As to fishing rights on navigable waters, generally, see § 14.

5 Muench v. Public Service Commission, 261 Wis. 492, 55 N.W.2d 40 (1952).

6 McKee v. Gratz, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922); Hanson v. Fergus Falls Nat. Bank, 242 Minn. 498, 65 N.W.2d 857, 49 A.L.R.2d 1379 (1954).

7 Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905).

8 Meredith v. Triple Island Gunning Club, 113 Va. 80, 73 S.E. 721 (1912).

9 State v. McGregor, 2017 MT 156, 388 Mont. 63, 398 P.3d 241 (2017).

10 Herrin v. Sutherland, 74 Mont. 587, 241 P. 328, 42 A.L.R. 937 (1925).

11 Gray v. Berg, 2016 ND 82, 878 N.W.2d 79 (N.D. 2016).

12 State v. Corbin, 343 N.W.2d 874, 41 A.L.R.4th 800 (Minn. Ct. App. 1984).

13 Hawthorne v. State, 43 Ga. App. 86, 158 S.E. 66 (1931).

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II. Hunting and Fishing Rights

A. Overview

2. In or on Private Lands and Waters

§ 21. Right of fishery of riparian owners

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

West's Key Number Digest, Water Law 1242

Fishing rights generally belong to the riparian owners,[1] subject to regulation by the state,[2] and subject to the right of the public to fish and hunt on navigable waters.[3] Thus, the public may fish navigable streams flowing through private property,[4] whereas the riparian owner does not have an exclusive right to the fishery, recognizing however that the right to fish in navigable waters does not carry with it the right to trespass upon the land of a riparian owner.[5]

Each riparian owner along a nonnavigable stream, whose title carries to the center of the stream, has the right to an exclusive fishery on his or her own side, extending to the center of the stream;[6] and so far as he or she owns the land on both sides of the stream, the owner has the sole privilege of fishing in that portion of the stream within his or her lands.[7] Even if a private stream is stocked by the state and gives rise to a colorable claim that the public is thus given a license to catch the fish from the stream, that gives members of the public no right to pass over the riparian owner's premises to get to the stream.[8]

Footnotes

1 Turner v. Selectmen of Hebron, 61 Conn. 175, 22 A. 951 (1891).
Riparian rights are special rights pertaining to the use of water in a waterway adjoining the owner's property, and may include fishing among other uses. Kranz v. Meyers Subdivision Property Owners Ass'n, Inc., 969 N.E.2d 1068 (Ind. Ct. App. 2012), decision clarified on reh'g, 973 N.E.2d 615 (Ind. Ct. App. 2012).
The owner of uplands on a tidal, navigable waterway possesses riparian rights, consisting of the right to reasonable access to the water for uses including fishing. Kearns v. Thilburg, 76 A.D.3d 705, 907 N.Y.S.2d 310 (2d Dep't 2010).
As to the definition and nature of riparian rights, generally, see Am. Jur. 2d, Waters §§ 33 to 54.

2 § 30.

[3] § 14.

[4] Lehigh Falls Fishing Club v. Andrejewski, 1999 PA Super 184, 735 A.2d 718 (1999); State v. Head, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1997).

[5] Michigan United Conservation Clubs v. Board of Trustees of Michigan State University, 172 Mich. App. 189, 431 N.W.2d 217, 50 Ed. Law Rep. 161 (1988).

[6] Millspaugh v. Northern Indiana Public Service Co., 104 Ind. App. 540, 12 N.E.2d 396 (1938) (overruled in part on other grounds by, Fort Wayne Nat. Bank v. Doctor, 149 Ind. App. 365, 272 N.E.2d 876 (1971)).

[7] Herrin v. Sutherland, 74 Mont. 587, 241 P. 328, 42 A.L.R. 937 (1925).

[8] Albright v. Cortright, 64 N.J.L. 330, 45 A. 634 (N.J. Ct. Err. & App. 1900).

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II. Hunting and Fishing Rights

A. Overview

2. In or on Private Lands and Waters

§ 22. Right of fishery of riparian owners—Limitations on right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

West's Key Number Digest, Water Law 1242

While a riparian owner has the exclusive right of fishery upon his or her own land, he or she must so exercise that right as not to injure others in the enjoyment of a right upon their lands, either above or below his or hers.[1] He or she is not permitted to wantonly destroy fish passing through the water over his or her land,[2] or to pollute the water to the injury of the fishing rights of a lower proprietor.[3] Another limitation on the riparian owner's rights is the power of regulation which the state may exercise over the taking of fish in either private or public waters.[4]

Footnotes

1 Griffith v. Holman, 23 Wash. 347, 63 P. 239 (1900).

2 State v. Haskell, 84 Vt. 429, 79 A. 852 (1911).

3 Reese v. Qualtrough, 48 Utah 23, 156 P. 955, 14 A.L.R. 94 (1916).

4 §§ 21, 30.

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A. Overview

2. In or on Private Lands and Waters

§ 23. Acquisition of hunting or fishing rights in premises of others

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 3, 5(.5) to 5(2)

West's Key Number Digest, Game 2.5, 3

Forms

Am. Jur. Legal Forms 2d §§ 118:4 to 118:28 (Forms pertaining to fish and game leases)

A right to hunt on the premises of another or to fish in the private waters of another may be acquired by a grant or lease from the owner.[1] An owner of lands may convey exclusive hunting rights thereon to others so as to bar the owner from hunting on his or her own premises.[2] Conversely, an owner may convey his or her premises and reserve hunting or fishing rights for the owner, his or her heirs, or assigns.[3]

The right to take fish from the private waters of another may be acquired by prescription through hostile and exclusive occupancy for the statutory period.[4] Each claimant to a prescriptive right must acquire it for himself or herself; and since certainty of the person is necessary to the validity of a grant or acquisition by prescription, presupposing a grant, the public, as such, cannot secure the right to fish in the waters by virtue of the acts of some of its members in taking fish therefrom for a long period of time;[5] nor can the public in general acquire the right by dedication, condemnation, or legislative act.[6] However, a conservation easement may grant hunting rights to a state Department of Fish and Game.[7]

The right to fish in private waters[8] or to hunt on the premises of another[9] is a property right. It is an interest in real estate in the nature of an incorporeal hereditament,[10] and is classified as a profit a prendre[11] which, unless the grant otherwise determines the rights of the parties, the owner may assign[12] and which may be inherited by his or her heirs.[13] As an interest in real estate, a right to fish and hunt is one which requires a writing for its creation.[14] Accordingly, a defendant's claim that he had an easement by prescription did not preclude his conviction for hunting without permission where there was no evidence

that the defendant or any member of his family had an easement by prescription concerning the owner's property, and even if the owner gave the defendant verbal permission to pursue a wounded deer onto the owner's property, the pertinent statute required written permission for one to hunt on another's land.[15]

The grant of a right to hunt over land must be strictly construed, and cannot be extended beyond the terms of the deed[16] and where such a grant is clear and not ambiguous, extraneous circumstances may not be introduced to explain or vary it;[17] nor can the grantee of the premises, where the grantor has reserved the hunting privileges, permit others to come on the land and hunt, although the grantee, or his or her assigns, have a qualified right to hunt which is subject to the fee of hunting privileges reserved to the grantor.[18]

In the absence of anything to the contrary in a grant of hunting or fowling privileges, the right to hunt and fowl is limited to the usual and reasonable methods generally used in the vicinity at the time of the execution of the grant, and the grantor is under no obligation to maintain a preserve for the pleasure and sport of the grantee, but the latter must exercise the right in the condition it may be at the time of the grant.[19] The grantor is not liable for depreciation in the value of such rights from his or her acts in clearing and draining the land, provided he or she does so in good faith for the purpose of improving it.[20] Although a reservation of recreational rights in the deed, which amounted to hunting rights, survived a conveyance from the original grantee to the subsequent owner, the reservation did not limit the owner's use of the affected land and therefore, absent malicious bad faith destruction of hunting rights, the owner was not liable to the grantor for damages to those rights which resulted from clear-cutting timber from the land.[21]

Footnotes

1 Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong, 184 Wis. 2d 572, 516 N.W.2d 410 (1994).

2 St. Helen Shooting Club v. Mogle, 234 Mich. 60, 207 N.W. 915 (1926); Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

3 Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

4 Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); Millspaugh v. Northern Indiana Public Service Co., 104 Ind. App. 540, 12 N.E.2d 396 (1938) (overruled in part on other grounds by, Fort Wayne Nat. Bank v. Doctor, 149 Ind. App. 365, 272 N.E.2d 876 (1971)).

5 Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930).

6 Millspaugh v. Northern Indiana Public Service Co., 104 Ind. App. 540, 12 N.E.2d 396 (1938) (overruled in part on other grounds by, Fort Wayne Nat. Bank v. Doctor, 149 Ind. App. 365, 272 N.E.2d 876 (1971)).
A warranty easement deed granted by a plantation to the United States, which deed placed a pond on the plantation's property into the Federal Wetlands Reserve Program in exchange for around $1.5 million, did not put the pond or its wildlife into the public domain, where the pond was not a navigable waterway and the deed specifically and unambiguously reserved to the plantation the sole "right to prevent trespass and to control access by the general public." Johnson v. De Kros, 2014 Ark. App. 254, 435 S.W.3d 19 (2014).

7 Wooster v. Department of Fish & Game, 211 Cal. App. 4th 1020, 151 Cal. Rptr. 3d 340 (3d Dist. 2012).

8 State v. Leavitt, 105 Me. 76, 72 A. 875 (1909).

9 Hanson v. Fergus Falls Nat. Bank, 242 Minn. 498, 65 N.W.2d 857, 49 A.L.R.2d 1379 (1954).

10 Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).

11 Hanson v. Fergus Falls Nat. Bank, 242 Minn. 498, 65 N.W.2d 857, 49 A.L.R.2d 1379 (1954).

12 Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938); Anderson v. Gipson,

144 S.W.2d 948 (Tex. Civ. App. Galveston 1940).

13 Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); St. Helen Shooting Club v. Mogle, 234 Mich. 60, 207 N.W. 915 (1926).

14 Hanson v. Fergus Falls Nat. Bank, 242 Minn. 498, 65 N.W.2d 857, 49 A.L.R.2d 1379 (1954).

15 Div. of Wildlife v. Freed, 101 Ohio App. 3d 709, 656 N.E.2d 694 (3d Dist. Hancock County 1995).

16 Isherwood v. Salene, 61 Or. 572, 123 P. 49 (1912).

17 Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

18 Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

19 St. Helen Shooting Club v. Mogle, 234 Mich. 60, 207 N.W. 915 (1926).

20 Isherwood v. Salene, 61 Or. 572, 123 P. 49 (1912).

21 Mikesh v. Peters, 284 N.W.2d 215 (Iowa 1979).
As to injury to hunting and fishing rights, generally, see §§ 24 to 26.

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Research References

West's Key Number Digest

West's Key Number Digest, Fish 5(3), 6, 7(3)

West's Key Number Digest, Game 1, 4

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West's A.L.R. Digest, Fish 5(3), 6, 7(3)
West's A.L.R. Digest, Game 1, 4

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B. Injury to Hunting and Fishing Rights

1. In General

§ 24. Injury to hunting and fishing rights, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 5(3), 6, 7(3)

West's Key Number Digest, Game 1, 4

The exclusive right to fish at a certain place, in either public or private waters, is a property right,[1] and an injury to such a right is actionable.[2] There is no right of action based directly on an injury to the fish in the waters, since until they are reduced to actual possession they belong to the state and not to the owner of the fishery.[3] Thus, if one pollutes the water, the proprietor cannot recover the value of the fish thereby killed, but he or she may recover for the injuries to his or her fishing rights,[4] and the operator of a fish hatchery can recover damages for the loss of fish because of the pollution of the waters of a creek feeding the hatchery.[5] Accordingly, in an action for damages for the pollution of a stream, although the plaintiff had no title in fish in the stream until they were caught, evidence was admissible to show that since the operation of the coal washer which was alleged to have been the source of the pollution the fish had decreased in the stream, the plaintiff's catch had diminished, and dead fish were discovered in the stream.[6]

A landowner has a qualified property in wild animals, enforceable as a civil right, and may maintain an action at law against a trespasser for the taking of such animals from his or her land.[7]

The state is deemed to be the trustee of wildlife for all citizens and has the obligation to bring suit not only to protect the corpus but also to recoup the public's loss occasioned by negligent acts of those who damage the property.[8]

Footnotes

1 § 23.

2 Griffith v. Holman, 23 Wash. 347, 63 P. 239 (1900).

[3] § 3.

[4] Masonite Corp. v. Steede, 198 Miss. 530, 23 So. 2d 756 (1945).

[5] Bales v. City of Tacoma, 172 Wash. 494, 20 P.2d 860 (1933).

[6] Tutwiler Coal, Coke & Iron Co. v. Nichols, 145 Ala. 666, 146 Ala. 364, 39 So. 762 (1905).

[7] McKee v. Gratz, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922); Herrin v. Sutherland, 74 Mont. 587, 241 P. 328, 42 A.L.R. 937 (1925).

[8] State v. City of Bowling Green, 38 Ohio St. 2d 281, 67 Ohio Op. 2d 349, 313 N.E.2d 409 (1974).

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B. Injury to Hunting and Fishing Rights

1. In General

§ 25. Injury to right to take shellfish

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 5(3), 6, 7(3)

The owner of an oyster bed, provided he or she has acquired the bed in compliance with the terms of a statute permitting the acquisition of such a right, may maintain an action against individuals and private or quasi-public corporations for damages to such oyster bed occasioned by pollution of the waters[1] or the grounding of a vessel,[2] and where oysters are taken from such a bed by trespassers, or where other shellfish are taken from private waters by trespassers, an action may be maintained for their conversion.[3] A license granted by a department of public works expressly providing that it should not be construed so as to impair the legal rights of any person is no defense to an action against a dredging contractor for loss of lobsters asphyxiated by silt raised in a dredging operation.[4]

A person suing for damages to his or her shellfish beds must show title thereto by a preponderance of the evidence where the title is in issue. In such a case, evidence of possession under a claim of right not disputed by anyone claiming to have a better or other title is sufficient proof of title.[5]

Under a state's natural resource laws, an action to remedy environmental damage to oyster beds may be brought by the state's department of wildlife and fisheries.[6]

Footnotes

1 Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910) (wherein a private gas manufacturing company was held liable for an injury to private oyster beds in waters, held under lease from the state, resulting from the discharge into such waters of deleterious by-products).

2 Melerine v. Tom's Marine & Salvage, LLC, 2019-672 La. App. 4 Cir. 3/4/20, 2020 WL 1056806 (La. Ct. App. 4th Cir. 2020), writ granted, 303 So. 3d 313 (La. 2020).

[3] Gratz v. McKee, 270 F. 713, 23 A.L.R. 1393 (C.C.A. 8th Cir. 1920), aff'd, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922).

[4] Bay State Lobster Co. v. Perini Corp., 355 Mass. 794, 245 N.E.2d 759 (1969).

[5] Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).

[6] State, Dept. of Wildlife and Fisheries v. Gulfport Energy Corp., 125 So. 3d 468 (La. Ct. App. 3d Cir. 2012).

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II. Hunting and Fishing Rights

B. Injury to Hunting and Fishing Rights

1. In General

§ 26. Conflict between fishing rights and navigation; unnecessary injury to fishery from navigation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 5(3), 6, 7(3)

A common right of fishery in public waters is held and enjoyed subject to the right of navigation.[1] The reason for the superiority of the right of navigation may be found in the circumstance that the piscatorial rights in the water may, as a general proposition, be exercised at numerous places in the water, but navigation is generally confined to certain definite localities. The mutual adjustment of the two rights in order that both may be reasonably enjoyed, therefore, requires that in the places available for navigation, the fishing rights be secondary.[2] Another reason is found in the greater public benefit derived from the navigation.[3]

While the right of navigation in navigable waters is paramount to that of fishing, it is not exclusive, and navigators cannot be indifferent to the rights of fishermen. The right of navigation limits the right of fishery only insofar as it interferes with the fair, useful, and legitimate exercise of the right of navigation.[4] The public easement of navigation in navigable-in-fact rivers does not sweep away or displace other rights accompanying private ownership of the bed of a navigable-in-fact river, including that of exclusive fishery.[5] Navigators who unnecessarily, designedly, or negligently run their boats or cast their anchors into nets, seines, or other fishing apparatus may be held liable for the injury.[6]

Footnotes

1 Winous Point Shooting Club v. Slaughterbeck, 96 Ohio St. 139, 117 N.E. 162 (1917); Anderson v. Columbia Contract Co., 94 Or. 171, 184 P. 240, 7 A.L.R. 653 (1919).

2 Winous Point Shooting Club v. Slaughterbeck, 96 Ohio St. 139, 117 N.E. 162 (1917).

3 Anderson v. Columbia Contract Co., 94 Or. 171, 184 P. 240, 7 A.L.R. 653 (1919).

[4] Anderson v. Columbia Contract Co., 94 Or. 171, 184 P. 240, 7 A.L.R. 653 (1919).

[5] Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997).

[6] Anderson v. Columbia Contract Co., 94 Or. 171, 184 P. 240, 7 A.L.R. 653 (1919).

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II. Hunting and Fishing Rights

B. Injury to Hunting and Fishing Rights

2. Remedies

§ 27. Trespass as remedy for injury to hunting or fishing rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 5(3), 6, 7(3)

West's Key Number Digest, Game 1, 4

A.L.R. Library

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805

Forms

Am. Jur. Pleading and Practice Forms, Fish and Game § 5 (Complaint, petition, or declaration—Injury to shellfish caused by industrial pollution of public waters)
Am. Jur. Pleading and Practice Forms, Fish and Game § 9 (Complaint, petition, or declaration—To enjoin trespassing for fishing)
Am. Jur. Pleading and Practice Forms, Fish and Game § 42 (Complaint, petition, or declaration—To enjoin trespasses substantially destroying value of game preserve)

An action for damages will lie for any intrusion upon private property for the purpose of hunting; such a trespasser commits a wrong against the owner, who has a remedy for nominal damages even if no other injury is shown.[1] A tenant in possession of the premises who has the right to exercise the hunting privileges thereon has sufficient legal title to maintain an action against a trespasser,[2] and the grantee of hunting rights is also entitled to maintain an action against a trespasser.[3] Shooting across private land without authorization may constitute trespass, even if the target was a decoy deployed by law enforcement in an

effort to curb poaching.[4]

If a person's fishery rights are wrongfully invaded or interfered with by another, he or she may maintain an action of trespass or similar remedy in tort for any injury suffered thereby.[5] Thus, trespass will also lie for the pollution of the waters of an exclusive fishery by another.[6] If one person enters the private property of another and takes fish from waters where the owner has an exclusive right to catch them, he or she is guilty of a trespass.[7] Under the view that a riparian owner who has title to the stream has a qualified right of ownership in the fish therein,[8] the person against whom the trespass is committed may recover the value of the fish taken as of the time of conversion.[9]

Footnotes

1 Swan Island Club v. Ansell, 51 F.2d 337 (C.C.A. 4th Cir. 1931).

2 Diana Shooting Club v. Lamoreaux, 114 Wis. 44, 89 N.W. 880 (1902).

3 Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

4 State v. Wilkinson, 724 So. 2d 614 (Fla. 5th DCA 1998).

5 Griffith v. Holman, 23 Wash. 347, 63 P. 239 (1900).

6 Hodges v. Pine Product Co., 135 Ga. 134, 68 S.E. 1107 (1910).

7 Herrin v. Sutherland, 74 Mont. 587, 241 P. 328, 42 A.L.R. 937 (1925).

8 § 21.

9 McKee v. Gratz, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922).

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B. Injury to Hunting and Fishing Rights

2. Remedies

§ 28. Recovery of economic loss as remedy for injury to hunting or fishing rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 5(3), 6, 7(3)

West's Key Number Digest, Game 1, 4

Generally maritime law bars recovery for purely economic losses in the absence of compensable injury to personal property.[1] However, notwithstanding the general federal maritime law rule that there can be no recovery for economic losses in the absence of compensible injury to personal property, commercial fisherman may recover purely economic losses, even in strict-liability suits.[2] Thus, commercial fishermen may recover for pure economic harm resulting from negligent acts that affect fishing waters,[3] although such an exception is a narrow one.[4] Even if there is an exception for commercial fishermen from general maritime law barring claims for purely economic losses sounding in tort, seafood dealers claiming damages from an oil spill are not "fishermen" entitled to invoke the exception.[5]

Footnotes

1 Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994); Slaven v. BP America, Inc., 786 F. Supp. 853 (C.D. Cal. 1992).

2 Slaven v. BP America, Inc., 786 F. Supp. 853 (C.D. Cal. 1992); Blue Gulf Seafood, Inc. v. TransTexas Gas Corp., 24 F. Supp. 2d 732 (S.D. Tex. 1998), aff'd in part, 244 F.3d 135 (5th Cir. 2000).

3 Blue Gulf Seafood, Inc. v. TransTexas Gas Corp., 24 F. Supp. 2d 732 (S.D. Tex. 1998), aff'd in part, 244 F.3d 135 (5th Cir. 2000).

4 Golnoy Barge Co. v. M/T Shinoussa, 841 F. Supp. 783 (S.D. Tex. 1993).

5 Complaint of Ballard Shipping Co., 810 F. Supp. 359 (D.R.I. 1993), decision aff'd in part, rev'd in part on other

grounds, 32 F.3d 623 (1st Cir. 1994).

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B. Injury to Hunting and Fishing Rights

2. Remedies

§ 29. Injunction as remedy for injury to hunting or fishing rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 5(3), 6, 7(3)

West's Key Number Digest, Game 1, 4

The damages recoverable in trespass by one having an exclusive fishery in certain waters against an intruder who takes fish therefrom are usually slight; and if the trespasses are continued, the proprietor has no adequate remedy at law. Under such circumstances, he or she is permitted to maintain an action in equity to restrain the trespasses.[1] The qualified property ratione soli to fish is such as will sustain an action by the landowner for an injunction to restrain invasions of it.[2] Furthermore, the jurisdiction of equity extends under a proper condition of facts to suits to restrain interference with oyster beds.[3] In like manner, where one or more persons continually violate or threaten to violate a landowner's rights, there is such a failure of a remedy at law that the equitable jurisdiction of the court may be invoked and further trespasses enjoined.[4] Accordingly, the shooting of guns over another's lands so as to cause considerable damage and impair the value of the landowner's shooting privileges is a wrong which may be restrained by injunction.[5]

The grantee of hunting rights, however, may not maintain an action for an injunction against his or her grantor for maliciously destroying such hunting rights, but must seek his or her remedy in an action at law, since damages at law are adequate.[6]

If a member of the public is denied his or her common right to hunt on public waters, the interference with his or her right may be enjoined.[7]

Footnotes

[1] Saginaw Lumber & Salt Co. v. Griffore, 145 Mich. 287, 108 N.W. 681 (1906).

[2] Dennig v. Graham, 227 Mo. App. 717, 59 S.W.2d 699 (1933).

[3] Cain v. Simonson, 39 So. 571 (Ala. 1905).

[4] Johnson v. Burghorn, 212 Mich. 19, 179 N.W. 225, 11 A.L.R. 234 (1920) (an injunction is the proper remedy to prevent trapping on submerged lands of a riparian owner); Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

[5] Whittaker v. Stangvick, 100 Minn. 386, 111 N.W. 295 (1907).

[6] Isherwood v. Salene, 61 Or. 572, 123 P. 49 (1912).

[7] Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (App. D.C. 1938).

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III. State and Local Regulation of Hunting and Fishing

A. In General

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West's A.L.R. Digest, Fish 8 to 10
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35A Am. Jur. 2d Fish, Game, and Wildlife Conservation § 30

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III. State and Local Regulation of Hunting and Fishing

A. In General

§ 30. State regulation of hunting and fishing, generally

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Validity, construction, and application of state wildlife possession laws, 50 A.L.R.5th 703

Forms

Am. Jur. Legal Forms 2d § 118:20 (Lessee's duty to comply with laws)

Under public trust doctrine, the state, acting on behalf of people, has right to regulate, control and utilize navigable waters for protection of certain public uses, including fisheries.[1] The state also has the power to lease public trust lands for limited purposes, including navigation, commerce, and fishing,[2] and to regulate fisheries in public and private streams[3] and control and regulate the taking of game,[4] subject to applicable provisions of the constitution.[5]

The right to regulate fish and game may be based either on the police power of the state[6] or on the fact that the fish in the waters of the state, as well as the game in its forests, belong to the people in their sovereign capacity,[7] and are not the subject of private ownership.[8] Since the state's wildlife population is a natural resource of the state held by it in trust for its citizens, the enactment of laws reasonably related to the protection of such wildlife constitutes a valid exercise of the police power vested in the legislature.[9]

It is not only the right of the states, but their duty,[10] to take such means as are reasonably necessary to conserve the fish and game within its jurisdiction from extermination or undue depletion.[11] Thus, generally hunting and fishing privileges must be regulated in a manner which comports with the public policy underlying management of wildlife resources.[12]

The right to kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority, and is not a right inhering in any individual. Consequently, nothing is taken from the individual, and his or her constitutional rights are not infringed when he or she is denied the privilege, or when limitations are placed on the killing or marketing of game.[13]

Observation:

Hunters, having chosen to participate in a highly regulated activity, have a lesser expectation of freedom under the Fourth Amendment from intrusions resulting from the enforcement of hunting and weapons safety regulations than citizens not engaged in regulated activity.[14]

The legislature has a great deal of discretion as to the means to be adopted for the conservation and protection of fish and game; and if these means do not violate any constitutional provision, the courts will not set up their judgment against that of the legislature as to whether they are the best or most equitable means that might have been adopted.[15] As a general rule, a law tending to conserve fish and game will be given such a construction as appears most reasonable and best suited to accomplish its purpose.[16]

Only the legislature may designate a species of animal as game. Once an animal has been designated as game, only the legislature may authorize the establishment of the first open season for that animal.[17]

A state statute outlawing fee hunting on alternative livestock ranches does not place an unconstitutional burden on interstate commerce, where the statute serves a legitimate public interest, does not discriminate overtly against interstate commerce, and imposes only incidental burdens on interstate commerce.[18]

Footnotes

1 Newton v. MJK/BJK, LLC, 167 Idaho 236, 469 P.3d 23 (2020).

2 World Business Academy v. California State Lands Commission, 24 Cal. App. 5th 476, 234 Cal. Rptr. 3d 277 (2d Dist. 2018), as modified on denial of reh'g, (July 10, 2018).

3 Tuttle v. Wood, 35 S.W.2d 1061 (Tex. Civ. App. San Antonio 1930), writ refused, (July 22, 1931); Judd v. Bernard, 49 Wash. 2d 619, 304 P.2d 1046 (1956) (the state may kill certain types of fish for the purpose of replacing the fish life in the water with the fish best suited for the food supply).

4 Totemoff v. State, 905 P.2d 954 (Alaska 1995); Opinion of the Justices, 128 N.H. 46, 509 A.2d 749 (1986).

5 Toomer v. Witsell, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

6 Bailey v. Smith, 581 S.W.3d 374 (Tex. App. Austin 2019), review denied, (Oct. 2, 2020); State v. Herwig, 17 Wis. 2d 442, 117 N.W.2d 335 (1962).
The right of the state, in the exercise of its police power, to regulate and control the taking of fish in all the public waters within its jurisdiction is a right so universally recognized and so uniformly affirmed, by both text-writers and courts, that it may not now be questioned. Madison Street Fishery, LLC v. Zehringer, 2017-Ohio-992, 86 N.E.3d 914 (Ohio Ct. App. 6th Dist. Erie County 2017).

7 State ex rel. Gray v. Stoutamire, 131 Fla. 698, 179 So. 730 (1938).

8 State v. Snowman, 94 Me. 99, 46 A. 815 (1900); State v. Tice, 69 Wash. 403, 125 P. 168 (1912).

9 State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).
The preservation of wild animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; ?and it is within the police power of the state, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game, and secure its beneficial use in the future to the citizens. In re Minnesota Dept. of Natural Resources Special Permit No. 16868 (December 21, 2012), 867 N.W.2d 522 (Minn. Ct. App. 2015).

10 Lacoste v. Department of Conservation of State of Louisiana, 263 U.S. 545, 44 S. Ct. 186, 68 L. Ed. 437 (1924).

11 Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928).

12 Petition of Snuffer, 193 W. Va. 412, 456 S.E.2d 493 (1995).

13 Fields v. Wilson, 186 Or. 491, 207 P.2d 153 (1949); State v. Pollock, 42 S.D. 360, 175 N.W. 557 (1919).

14 Mollica v. Volker, 229 F.3d 366 (2d Cir. 2000).

15 State v. Philips, 70 Fla. 340, 70 So. 367 (1915); State v. McCullagh, 96 Kan. 786, 153 P. 557, 11 A.L.R. 980 (1915).

16 People v. Clair, 221 N.Y. 108, 116 N.E. 868 (1917).

17 Michigan Audubon Soc. v. Natural Resources Com'n, 206 Mich. App. 1, 520 N.W.2d 353 (1994).

18 Spoklie v. Montana, 411 F.3d 1051 (9th Cir. 2005).

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III. State and Local Regulation of Hunting and Fishing

A. In General

§ 31. State regulation of hunting and fishing when other states are affected

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

While a state generally has the right to limit fishing and hunting rights through regulation within its jurisdiction,[1] based on the theory the state owns the wild fish and game within the state and its waters,[2] this does not give the state an exclusive right where other states are affected (states may have an affirmative duty to conserve the natural resources within their boundaries for the benefit of other states, including anadromous fish hatched in waters within the state), and such rights may be affected by federal conservation laws[3] as well as treaties between the federal government and sovereign native tribes. Thus, the federal government may, by grant, convey a right of fishery to a private person or, by a treaty with some tribe of Indians, give the members of such tribe fishing privileges in public waters.[4]

Observation:

A state statute that regulated the labeling of catfish violated the dormant Commerce Clause, where the statute treated domestic catfish differently from foreign catfish to the benefit of the former and the detriment of the latter.[5]

Footnotes

1 State ex rel. Visser v. State Fish and Game Commission, 150 Mont. 525, 437 P.2d 373 (1968).
As to the regulation of hunting and fishing, see §§ 30, 32 to 34.

[2] § 1.

[3] As to wildlife conservation and federal legislation, see §§ 60 to 70.

[4] Seufert Bros. Co. v. U.S., 249 U.S. 194, 39 S. Ct. 203, 63 L. Ed. 555 (1919).

[5] Piazza's Seafood World, LLC v. Odom, 448 F.3d 744 (5th Cir. 2006).

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III. State and Local Regulation of Hunting and Fishing

A. In General

§ 32. Municipal regulation of hunting and fishing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

Fish in the waters within the boundaries of the state belong to the people of the state and not to the residents of a particular municipality of the state; and unless the state delegates power to a municipality relative to the taking of fish within its limits, the municipality can make no regulations which affect the rights of fishing in public waters.[1] Shellfishing grounds are not owned by a municipality in the absence of a granting of private rights, even if the legislature enables a municipality to lease or license shellfishing grounds located within its borders.[2] One municipality or section cannot be authorized to exclude the residents of other parts of the state from taking fish from its waters, and yet permit its own inhabitants to take them.[3]

While the state, and not a town as the owner of underwater lands, has authority to regulate and control the right of fishing for migratory marine fish, such as crabs and conchs, from navigable waters, to extent that the manner in which fishermen's attempts to remove migratory fish from the waters require them to disturb the underwater lands, a town may prohibit them from trespassing by placing fishing gear on those lands.[4]

Where enabled by appropriate statutory authority, specific limitations authorized by statute may be valid as against a constitutional challenge.[5]

Footnotes

1 Nash v. Vaughn, 133 Fla. 499, 182 So. 827 (1938).

2 Shoreline Shellfish, LLC v. Town of Branford, 2020 WL 4354902 (Conn. 2020).

3 Barker v. State Fish Com'n, 88 Wash. 73, 152 P. 537 (1915).

4 Brookhaven Baymen's Ass'n, Inc. v. Town of Southampton, 85 A.D.3d 1074, 926 N.Y.S.2d 594 (2d Dep't 2011).

[5] State v. Alley, 274 A.2d 718 (Me. 1971) (an enabling statute authorizing a town to enact an ordinance imposing residence requirements for the commercial taking of shellfish from tidal flats within the town to the exclusion of nonresidents was not a denial of equal protection).

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III. State and Local Regulation of Hunting and Fishing

A. In General

§ 33. Regulation of hunting and fishing by board or commission

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

The regulatory power of the state over fish and game within its boundaries may, to a certain extent, be delegated to a board or commission.[1] The legislature may delegate to a commission the power to stock streams or ponds with fish and to close them against fishing,[2] and it may authorize the commission to reserve any waters of the state for the propagation of fish.[3] An act authorizing the county game commission to select and set apart land of the county as a game preserve is not an unlawful delegation of legislative power.[4]

Footnotes

1 Tuttle v. Wood, 35 S.W.2d 1061 (Tex. Civ. App. San Antonio 1930), writ refused, (July 22, 1931).
Standards in a statute regarding a quota management system for Lake Erie fish equated to a procedure whereby an exercise of the discretion could be reviewed, and thus the statute was not unconstitutional with regard to the administrative powers delegated, where the statute stated that the Chief of the Division of Wildlife and Wildlife Council could establish a quota management system that consisted of determining on a scientific basis the maximum allowable annual taking of fishery resources in order to prevent overexploitation of any species and assure the conservation and wise use of all species. Madison Street Fishery, LLC v. Zehringer, 2017-Ohio-992, 86 N.E.3d 914 (Ohio Ct. App. 6th Dist. Erie County 2017).

2 Monroe v. Withycombe, 84 Or. 328, 165 P. 227 (1917).

3 Schmidt v. Gould, 172 Minn. 179, 215 N.W. 215 (1927).

4 Cawsey v. Brickey, 82 Wash. 653, 144 P. 938 (1914).
As to wildlife conservation, see §§ 60 to 70.

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III. State and Local Regulation of Hunting and Fishing

A. In General

§ 34. Concurrent jurisdiction of waters between two states as affecting regulation of hunting and fishing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

The concurrent jurisdiction which two states may have over the width of a river, the center of which forms the territorial boundaries of the states, is not to be construed as giving one state authority to punish violations of its fish laws occurring beyond its side of the river, if such act is duly authorized by the neighboring state.[1] Such concurrent jurisdiction does not operate to deprive one state from regulating fishing within its territorial limits.[2] However, where two states have concurrent jurisdiction over a river and have practically identical statutes requiring licenses to fish therein, a conviction may be had in either state under such statutes for a violation thereof.[3]

Footnotes

1 Miller v. McLaughlin, 281 U.S. 261, 50 S. Ct. 296, 74 L. Ed. 840 (1930).

2 Miller v. McLaughlin, 281 U.S. 261, 50 S. Ct. 296, 74 L. Ed. 840 (1930).

3 Olin v. Kitzmiller, 259 U.S. 260, 42 S. Ct. 510, 66 L. Ed. 930 (1922).

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35A Am. Jur. 2d Fish, Game, and Wildlife Conservation III B Refs.

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III. State and Local Regulation of Hunting and Fishing

B. Application of State Regulation to Particular Parties or Acts

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West's Key Number Digest, Fish 8 to 10

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III. State and Local Regulation of Hunting and Fishing

B. Application of State Regulation to Particular Parties or Acts

§ 35. Application of state regulation of hunting and fishing to particular parties or acts, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

The legislature may make such provision and impose such regulations as it deems proper for the preservation and conservation of game animals, fish and native plant life within the state as long as the regulation is reasonable and does not deny due process and equal protection of the law.[1] Accordingly, because fish are ferae naturae, they are property of the state and thus, unless otherwise provided by a statute prohibiting the taking of undersized fish, fishermen found in possession of undersized fish were not denied equal protection of the laws by application of the statute to them.[2]

Due process of law and equal protection guarantees do apply, however;[3] thus for example an individual's interest in an application for a limited entry fishing permit is entitled to due process protection.[4]

The guaranty of the equal protection of the laws does not preclude all discrimination as to persons who hunt and fish within the borders of a state.[5] Accordingly, a statute regulating the erection of duck blinds, requiring them to be at least 500 yards apart, conferring upon the riparian owner a preferential right to select the position for a blind, subject to the consent of the adjoining landowner to the placing of a blind within 250 yards of the dividing line, does not violate the Equality Clause of the Fourteenth Amendment as discriminating in favor of property owners with a frontage of more than 500 yards or because it provides that on certain waters blinds need not be placed farther apart than 250 yards.[6] In addition, the failure of a state department of fish and wildlife to allocate equal catch shares between gillnetters and purse seiners when setting the chum fishing schedule for a calendar year does not deny equal protection to the group which receives the lower allocation.[7]

A discrimination generally passes constitutional muster if it is based on some reasonable ground, on some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.[8] Indeed, the discretion of the legislature in distinguishing and classifying certain classes of game will not be disturbed by the courts where such classification and distinction has some just, fair, and practical basis in real differences with reference to the subject regulated.[9] Accordingly, the operators of freezer ships taking or purchasing fish from Alaska's territorial waters for canning in another state are not discriminated against by being taxed at a greater rate than fish processors selling to the fresh frozen consumer

market, since they are not competitors; nor are the freezer ship operators discriminated against because there is no tax on salmon caught and frozen in Alaska, for canning in Alaska, where Alaska canners pay a higher tax on the value of salmon obtained for canning.[10]

Laws reasonably drawn to protect against overfishing while also protecting the commercial fishing industry and those persons who have invested in and practiced a particular kind of fishing, may limit the number of permits and impose other limitations to effect those purposes without constituting a denial of equal protection to applicants denied permits.[11] Within reasonable limits the legislature may prohibit fishing at certain seasons in particular territories in certain waters, while permitting such fishing in other districts or in other waters in the state,[12] and, similarly, it may classify territory in the game laws and thereby prevent hunting in a portion of the state and permit it elsewhere.[13] Alternatively, it may regulate the manner in which fish shall be caught or taken from certain waters within the state, while permitting other methods in other waters.[14] Likewise, it may prohibit the catching of certain fish for purposes of sale, although permitting it for sport or family use.[15]

Generally, it may be said that legislation regulating hunting and fishing or protecting fishing rights is not discriminatory if it applies equally to all persons under similar circumstances and conditions.[16] However, as a general rule, regulation which unjustly discriminates against any of the people of the state is void as a denial of the equal protection of the laws of those discriminated against.[17] Accordingly, statutes which prohibited residents of one county from taking or catching crabs or oysters in another county were an unconstitutional denial of equal protection since the residential requirements and territorial restrictions did not rest upon a reasonable basis but were burdensome, discriminatory and arbitrary.[18] On the other hand, a statute prohibiting, during the closed season for salmon fishing, the transportation through the protected waters of salmon caught outside the jurisdiction of the state does not, in precluding transportation to market by water of fish which may lawfully be transported to the same market by a land route, violate constitutional equal protection requirements.[19]

Observation:

Preferential granting of permits to hunt or take wildlife may, however, be based on legitimate and reasonable state purposes. For example, in order to effectively manage a healthy deer population, the state may exercise its police power to issue "deer management permits" which authorize a group of licensed hunters holding such a permit to take one deer of either sex in addition to the limit of one deer per licensed hunter for a license year; such permits may constitutionally be issued preferentially to groups containing a person who owns at least 50 acres of land in one parcel in the specified hunting area to which the permit applies, since this preference serves a legitimate state interest in having the greatest amount of area possible open to licensed hunters, for landowners assured of receiving permits will be less likely to close their land to other hunters.[20]

A regulation by the state may also be attacked on vagueness grounds,[21] because the regulation constitutes an arbitrary and unreasonable interference with innocent conduct and it lacks any rational, real or substantial relation to the public health, morals, order, safety or general welfare.[22]

Footnotes

1 Wallace v. Shields, 175 Ariz. 166, 854 P.2d 1152 (Ct. App. Div. 1 1992).

2 Aikens v. State Dept. of Conservation, 387 Mich. 495, 198 N.W.2d 304 (1972).

3 Dominish v. State, Commercial Fisheries Entry Com'n, 907 P.2d 487 (Alaska 1995).

4 Bartlett v. State Commercial Fisheries Entry Com'n, 948 P.2d 987 (Alaska 1997).

[5] Lacoste v. Department of Conservation of State of Louisiana, 263 U.S. 545, 44 S. Ct. 186, 68 L. Ed. 437 (1924); Teuton v. Thomas, 100 Fla. 78, 129 So. 330 (1930).

[6] Wampler v. Lecompte, 282 U.S. 172, 51 S. Ct. 92, 75 L. Ed. 276 (1930).

[7] Puget Sound Harvesters Ass'n v. Washington State Dept. of Fish and Wildlife, 182 Wash. App. 857, 332 P.3d 1046 (Div. 1 2014), stating that differential fishing gear regulations do not trigger equal protection considerations.

[8] Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936); State v. Terrell, 303 S.W.2d 26 (Mo. 1957).

[9] State v. Philips, 70 Fla. 340, 70 So. 367 (1915).

[10] Alaska v. Arctic Maid, 366 U.S. 199, 81 S. Ct. 929, 6 L. Ed. 2d 227 (1961).

[11] Martinet v. Department of Fish & Game, 203 Cal. App. 3d 791, 250 Cal. Rptr. 7 (4th Dist. 1988).

[12] Union Fishermen's Co-operative Packing Co. v. Shoemaker, 98 Or. 659, 193 P. 476 (1920).

[13] Barker v. State Fish Com'n, 88 Wash. 73, 152 P. 537 (1915).

[14] Com. v. Moyers, 272 S.W.2d 670 (Ky. 1954).

[15] State v. Dow, 70 N.H. 286, 47 A. 734 (1900).

[16] State v. Bryan, 87 Fla. 56, 99 So. 327 (1924); State v. Savage, 96 Or. 53, 184 P. 567 (1919), opinion adhered to on denial of reh'g, 189 P. 427 (Or. 1920).

[17] Harper v. Galloway, 58 Fla. 255, 51 So. 226 (1910).

[18] Bruce v. Director, Dept. of Chesapeake Bay Affairs, 261 Md. 585, 276 A.2d 200 (1971).

[19] Johnson v. Gentry, 220 Cal. 231, 30 P.2d 400, 92 A.L.R. 1264 (1934).

[20] Schwartzman v. Berle, 98 Misc. 2d 936, 415 N.Y.S.2d 187 (Sup 1979).

[21] Department of Natural Resources v. Blue Ridge Mountain Fisheries, Inc., 262 Ga. 305, 417 S.E.2d 12 (1992).

[22] State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

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III. State and Local Regulation of Hunting and Fishing

B. Application of State Regulation to Particular Parties or Acts

§ 36. Application of state hunting and fishing regulations to nonresidents and aliens

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

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Validity, Construction, and Application of State Statutes Prohibiting, Limiting, or Regulating Fishing or Hunting in State by Nonresidents, 31 A.L.R.6th 523

While its inherent police powers allow states broad authority to control the taking of wildlife for sport,[1] the Privileges and Immunities Clause of the Federal Constitution may limit the state power to enact legislation that discriminates against nonresidents as to fees for hunting or fishing licenses unless it is shown that the differential in license fees is reasonably based compensation for an added enforcement burden or for any conservation expenditures from taxes which only residents pay.[2] Generally, the state has sufficient special interest in fish and wildlife within its boundaries that it is entitled to grant allocational preferences to state resident recreational users.[3] The inquiry in each case must be concerned with the question as to whether reasons for differentiation between residents and nonresidents exist and whether the degree of discrimination bears a close relation to them. The inquiry must also be conducted with due regard for the principle that the state should have considerable leeway in analyzing local evils and in prescribing appropriate cures.[4] Thus, where the state can show valid independent reasons for disparity of treatment between residents and nonresidents, a higher license fee may be imposed,[5] or more severe penalties for violation of hunting and fishing regulations may properly be imposed by the state.[6] Consistent with the foregoing principles, it has been held that the state statutory provisions requiring nonresidents, unlike residents, to obtain a small game and waterfowl license to hunt on land they owned or leased did not violate the Privileges and Immunities Clause of the Federal Constitution.[7] On the other hand, it has also been held that a statutory scheme wherein nonresident commercial fishermen were charged three times as much for permit and license fees was not rationally related to the goal of equalizing the burden of fisheries management between nonresidents and residents, and thus the scheme violated the Privileges and Immunities Clause, the court stating that under the scheme, if in a given year the nonresident fee differential

for a particular fee class equaled or fell below the permissible differential, this was pure chance, since the differential was not tied to the state's fisheries budget.[8]

Where a state fails to show a reasonable basis for discriminatory provisions directed at nonresident hunters, such discriminatory statutes cannot be justified by the state police powers.[9]

Observation:

Federal licensing may preempt and render invalid state laws discriminating against aliens and nonresidents as to fishing in territorial coastal waters.[10]

Aliens may be forbidden the right to hunt or fish.[11] Accordingly, unnaturalized foreign-born residents are not unconstitutionally discriminated against by a statute which prohibits them from taking or killing wild birds and animals, except in defense of person or property.[12]

Observation:

Federal laws may impose national standards prohibiting fishery conservation and management measures that discriminate between residents of different states.[13]

Footnotes

1 § 30.

2 Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978); Mullaney v. Anderson, 13 Alaska 574, 342 U.S. 415, 72 S. Ct. 428, 96 L. Ed. 458 (1952).

3 Shepherd v. State, Dept. of Fish and Game, 897 P.2d 33 (Alaska 1995).

4 Toomer v. Witsell, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

5 Terk v. Gordon, 436 U.S. 850, 98 S. Ct. 3063, 56 L. Ed. 2d 751 (1978); Haavik v. Alaska Packers' Ass'n, 263 U.S. 510, 44 S. Ct. 177, 68 L. Ed. 414 (1924).

6 Bondi v. Mackay, 87 Vt. 271, 89 A. 228 (1913).

7 Minnesota ex rel. Hatch v. Hoeven, 370 F. Supp. 2d 960 (D.N.D. 2005), judgment aff'd, 456 F.3d 826 (8th Cir. 2006) (also holding that nonresident waterfowl hunters regulated by the state were not "persons in commerce" subject to the Commerce Clause of the Federal Constitution, inasmuch as their interstate movement was a pursuit of purely recreational activity).
Nonresident landowners do not have a right to hunt wildlife on their land that is sufficiently fundamental to trigger the protections of the Privileges and Immunities Clause of Federal Constitution with respect to statute distinguishing

between resident and nonresident landowners for the purposes of granting special hunting privileges; the legislature extinguished any common-law right to hunt on one's own land through an extensive statutory scheme concerning wildlife within the state borders and regulating the manner, places, and times in which certain species of wildlife may be taken and in what numbers. Democko v. Iowa Dept. of Natural Resources, 840 N.W.2d 281 (Iowa 2013).

[8] State, Commercial Fisheries Entry Com'n v. Carlson, 191 P.3d 137 (Alaska 2008) (also holding that in calculating the amount of refunds due to nonresident commercial fishermen who were charged higher license and permit fees than was allowable under the Privileges and Immunities Clause, the superior court was required to determine whether any inequality between residents and nonresidents was incidental, within a reasonable margin of error in the range of up to 50%, and therefore constitutionally tolerable, or substantial and thus unconstitutional; precise equality between the burdens shouldered between residents and nonresidents was not required).

[9] Schakel v. State, 513 P.2d 412 (Wyo. 1973) (nonresident hunters were denied equal protection under a statute prohibiting any person not the owner of a resident license or permit to hunt designated animal species on national forest, park, or game refuge lands within the state unless accompanied by licensed guide, where it was shown that the statute did not operate to preserve or protect wildlife, nor to promote safety of hunters).

[10] Douglas v. Seacoast Products, Inc., 431 U.S. 265, 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977).

[11] State v. McCullagh, 96 Kan. 786, 153 P. 557, 11 A.L.R. 980 (1915); State v. Kofines, 33 R.I. 211, 80 A. 432 (1911).

[12] Patsone v. Com. of Pennsylvania, 232 U.S. 138, 34 S. Ct. 281, 58 L. Ed. 539 (1914).

[13] Com. of Mass. by Div. of Marine Fisheries v. Daley, 10 F. Supp. 2d 74 (D. Mass. 1998), aff'd, 170 F.3d 23 (1st Cir. 1999).

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III. State and Local Regulation of Hunting and Fishing

B. Application of State Regulation to Particular Parties or Acts

§ 37. Application of state game statutes to game killed in another state

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Fish 8 to 10
West's Key Number Digest, Game 3.5 to 5

Game laws usually contain language sufficient to evidence the legislature's intention to apply or not to apply them to game taken outside the state's territorial jurisdiction and subsequently brought into the state's territorial jurisdiction,[1] such as laws which prescribe terms and conditions for lawful possession of game which are not necessarily dependent on the location the game was reduced to possession.[2] Generally the term "game" in a statute which does not by express language indicate that the game of another state is either excluded or included refers to all game, both domestic and foreign.[3] To the extent, however, that game regulations are penal statutes, they may be strictly construed to refer only to animals killed within the jurisdiction, unless their terms require a different construction.[4]

Footnotes

1 State v. Pollock, 42 S.D. 360, 175 N.W. 557 (1919).

2 State v. Piazza, 668 So. 2d 1125 (La. 1996).

3 Taylor v. Penton, 99 Fla. 1067, 128 So. 499 (1930); White v. State, 93 Fla. 905, 113 So. 94 (1927).

4 Taylor v. Penton, 99 Fla. 1067, 128 So. 499 (1930).

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III. State and Local Regulation of Hunting and Fishing

B. Application of State Regulation to Particular Parties or Acts

§ 38. Application of state game statutes to taking of game in defense of person or property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

Generally, a statute forbidding the killing of game under penalty does not apply to a killing which is necessary for the defense of person or property, although to justify such a killing it must be reasonably necessary for the protection of a person or property.[1]

Game may not be killed as a punishment for its past trespass.[2] The killing of game in defense of property is not an adequate defense to a statute protecting certain game where a property owner could have avoided injury to his or her property by other reasonable methods, such as fencing, the statute protecting game deserving a presumption of validity and applicability pursuant to a valid exercise of the police power.[3] However, the duties of a person who has killed game in defense of life or property to "salvage the meat" and "surrender the salvaged meat" are not met by merely notifying the authorities of the location of the kill and inviting them to come pick up the animal, but rather the person who has killed the game animal in defense of life or property may have a statutory duty to deliver the meat to the authorities and to exercise reasonable care in assuring that the meat is delivered in edible condition.[4]

Footnotes

1 Commonwealth v. Masden, 295 Ky. 861, 175 S.W.2d 1004, 169 A.L.R. 101 (1943); Cross v. State, 370 P.2d 371, 93 A.L.R.2d 1357 (Wyo. 1962).

2 State v. Burk, 114 Wash. 370, 195 P. 16, 21 A.L.R. 193 (1921).

3 Barrett v. State, 220 N.Y. 423, 116 N.E. 99 (1917).

4 Jurco v. State, 816 P.2d 913 (Alaska Ct. App. 1991).

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C. Scope of State Regulation

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Research References

West's Key Number Digest

West's Key Number Digest, Commerce 82.40

West's Key Number Digest, Fish 8 to 10
West's Key Number Digest, Game 3.5 to 5
West's Key Number Digest, States 18.33

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

1. In General

§ 39. Scope of state regulation of hunting and fishing, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

The police power of a state to regulate the manner and taking of animal life may extend beyond game to any sort of animal, wild or domestic.[1] The right of the state, in the exercise of its police power, to regulate and control the taking of fish in all the public waters within its jurisdiction is a right so universally recognized and so uniformly affirmed, by both text-writers and courts, that it may not now be questioned.[2] Under the state's police power to preserve and regulate an important resource, which gives it authority over wild game,[3] the state may prohibit the killing of certain game for any purpose, or, if it permits the killing of such game, may allow it for one purpose and forbid it for another.[4] Accordingly, an emergency regulation regarding the fall caribou hunt was capable of standing on its own absent an invalid participatory component, where the remainder of the regulation allowed every Alaskan to take one caribou from a herd during the fall hunting season until 2,000 caribou had been taken.[5]

The state may also allow taking under special circumstances subject to special conditions in particular areas as opposed to other areas,[6] and may adopt procedures for granting some persons licenses or permits and not others, as well as for revocation and denial of hunting or fishing privileges.[7]

Observation:

The failure to advise a holder of a shellfish digger's permit that he had the right to counsel in revocation proceedings did not deprive him of due process inasmuch as the right to counsel was conferred by an administrative regulation and was not guaranteed by the constitutional right to due process.[8]

The regulatory authority of the state may extend to the promulgation of safety regulations such as requiring modern gun hunters to wear fluorescent orange clothing while hunting,[9] as well as to laws intended to prohibit cruelty to domesticated animals and wild animals previously reduced to captivity.[10] A regulation prohibiting the possession or collection of reptiles for commercial purposes does not improperly confer protected status on the statutorily unprotected reptiles where the regulation does not prohibit the hunting of unprotected reptiles, but merely hunting in order to sell the reptiles.[11]

The state may prohibit the catching of fish within its waters, or if it allows the catching, it may regulate it by the imposition of such conditions, restrictions, and limitations as it deems needful or proper.[12] The taking and marketing of shellfish,[13] including oysters under tidal waters as well as those under nontidal waters,[14] is subject to governmental regulation to the same extent as is the taking and marketing of swimming fish. The protective power of the state extends also to animals not generally used for food as well as to nonedible fish.[15]

The regulatory power of the state extends to animals ferae naturae which are bred and raised in captivity.[16] The police power of the state may be exercised to prevent trapping by cruel and inhuman means, even though such traps may be the only practical means a farmer has to protect his or her livestock, crops, or fruit trees from the depredations of wild animals.[17]

States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation.[18]

Footnotes

1 State v. McAffry, 263 Kan. 521, 949 P.2d 1137 (1997).

2 Madison Street Fishery, LLC v. Zehringer, 2017-Ohio-992, 86 N.E.3d 914 (Ohio Ct. App. 6th Dist. Erie County 2017).

3 Bailey v. Smith, 581 S.W.3d 374 (Tex. App. Austin 2019), review denied, (Oct. 2, 2020).

4 Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988); Opinion of the Justices, 128 N.H. 46, 509 A.2d 749 (1986).

5 State v. Palmer, 882 P.2d 386 (Alaska 1994).

6 Humane Soc. of U.S. v. County of Monroe, 192 A.D.2d 1139, 596 N.Y.S.2d 222 (4th Dep't 1993).

7 Kodiak Seafood Processors Ass'n v. State, 900 P.2d 1191 (Alaska 1995); Rose v. Board of Selectmen of Falmouth, 36 Mass. App. Ct. 34, 627 N.E.2d 478 (1994); Petition of Snuffer, 193 W. Va. 412, 456 S.E.2d 493 (1995).
In a statute providing for revocation of authorization to catch oysters if a person has "knowingly committed" a violation of oyster harvesting regulations, the term "knowingly" means deliberately or intentionally, and does not require proof that the licensee is subjectively aware that his or her act is unlawful. Hayden v. Maryland Department of Natural Resources, 242 Md. App. 505, 215 A.3d 827 (2019).

8 Stevenson v. Jorling, 201 A.D.2d 980, 607 N.Y.S.2d 836 (4th Dep't 1994).
As to due process and equal protection, generally, see §§ 35, 36.

9 R.S.B. v. State, 632 So. 2d 24 (Ala. Crim. App. 1993); Armstrong v. State, 91 Wash. App. 530, 958 P.2d 1010 (Div. 2 1998).

10 State v. Cleve, 1999-NMSC-017, 127 N.M. 240, 980 P.2d 23 (1999).

11 Nevada Dept. of Wildlife v. Bentz, 106 Nev. 294, 792 P.2d 28 (1990).

12 Miller v. McLaughlin, 281 U.S. 261, 50 S. Ct. 296, 74 L. Ed. 840 (1930).

13 State v. Van Vlack, 101 Wash. 503, 172 P. 563 (1918) (abrogated on other grounds by, Yim v. City of Seattle, 194

Wash. 2d 682, 451 P.3d 694 (2019)).

14 Lee v. State of New Jersey, 207 U.S. 67, 28 S. Ct. 22, 52 L. Ed. 106 (1907).

15 In re Schwartz, 119 La. 290, 44 So. 20 (1907).

16 § 41.

17 Commonwealth v. Higgins, 277 Mass. 191, 178 N.E. 536, 79 A.L.R. 1304 (1931).
As to justification for the killing or trapping of game out of season to protect property, see § 38.

18 Herrera v. Wyoming, 139 S. Ct. 1686, 203 L. Ed. 2d 846 (2019).
Indians' rights to hunt and fish, see Am. Jur. 2d, Indians, Native Americans §§ 58 to 61; treaties with Indians, generally, see Am. Jur. 2d, Indians, Native Americans §§ 48 to 51.

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

1. In General

§ 40. Scope of state regulation of hunting and fishing in private waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

There is a distinction between fish and game as to the scope of regulations limiting their taking relative to private property, in that unlike game which is generally considered to not be the property of a landowner even though that game is on private property[1] fish found in wholly contained private waters such as ponds are considered the property of the owner of those waters and land.[2] Thus, while hunting regulations apply to the taking of game even within private property,[3] the taking of fish from wholly private ponds is generally not subject to fishing regulations.[4] However, where nonnavigable streams, lakes, or ponds are so connected with other waters of the state as to permit of the migration of fish, the state may, to preserve fish and in the interest of the public, regulate the manner of and prescribe the seasons for their taking, notwithstanding private ownership of the soil under such waters.[5]

Reminder:

While fishing regulations may not restrict fishing from private waters, provisions regulating transportation and sale may apply to fish taken from private property.[6]

Footnotes

[1] § 1.

[2] § 6.

[3] § 39.

[4] Washburn v. State, 90 Okla. Crim. 306, 213 P.2d 870, 15 A.L.R.2d 751 (1950).

[5] State v. Lowder, 198 Ind. 234, 153 N.E. 399 (1926).

[6] § 48.

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

1. In General

§ 41. Scope of state regulation of hunting of domesticated or captive game

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

The state may, in the enactment of game laws for the protection of wild animals and as a means of preventing the evasion of such laws, extend its regulations to include game raised in captivity,[1] although game laws which are penal in character are not, as a general rule, construed to apply to domestic or captive game unless they are expressly or by necessary implication made applicable.[2]

While privately held animals kept in captivity are distinguished from wildlife or game, if they are released into the wild or allowed to roam away from captivity, and by nature they are wild, they may regain their status as an animal ferae naturae.[3] Thus, while an unqualified property right in wild animals may arise when they are legally removed from their natural liberty and made subjects of man's dominion, that right is lost if the animal regains its natural liberty.[4]

Observation:

The Fish and Wildlife Service (FWS) regulation setting forth permit exceptions for captive-reared mallard ducks does not prohibit a state from regulating the raising, use, or transportation of captive-reared mallard ducks.[5] Moreover, that portion of the FWS regulation which states that captive-reared mallard ducks may be acquired, possessed, or sold "without a permit" means without a permit from the Department of the Interior, and does not prohibit a state from requiring a permit for the possession and selling of captive-reared mallard ducks.[6]

A state game and fish commission's regulations concerning captive-reared mallard ducks, under which the commission revoked defendant's permits to raise ducks, were not preempted by migratory bird treaties, the United States entered into with Great Britain, Mexico, Japan and Russia, or the Migratory Bird Treaty Act giving effect to the treaty with Great Britain, as the treaties did not explicitly preempt state law from regulating migratory birds and did not purport to exclusively occupy the field of migratory bird regulation for propagating purposes or for private game farms, the treaties expressly provided that exceptions were

to be governed by other authorities, and the state's regulations were consistent with the treaties in that they provided additional protection for migratory birds.[7]

Footnotes

1 State v. Pollock, 42 S.D. 360, 175 N.W. 557 (1919).

2 Schultz v. Morgan Sash & Door Co., 1959 OK 149, 344 P.2d 253, 74 A.L.R.2d 967 (Okla. 1959).

3 § 2.
As to property rights in wild animals, generally, see Am. Jur. 2d, Animals §§ 11 to 15.

4 State v. Bartee, 894 S.W.2d 34 (Tex. App. San Antonio 1994).

5 Noe v. Henderson, 373 F. Supp. 2d 939 (E.D. Ark. 2005), order aff'd, 456 F.3d 868 (8th Cir. 2006).

6 Noe v. Henderson, 373 F. Supp. 2d 939 (E.D. Ark. 2005), order aff'd, 456 F.3d 868 (8th Cir. 2006).

7 Noe v. State, 2011 Ark. App. 155, 381 S.W.3d 915 (2011).

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

1. In General

§ 42. Scope of state regulation of importation and exportation of fish and game; interstate commerce

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 82.40

West's Key Number Digest, Fish 8 to 10
West's Key Number Digest, Game 3.5 to 5

Generally, regulations affecting the interstate transporting of game and fish must satisfy a legitimate state purpose which cannot be reasonably addressed by a nondiscriminatory purpose.[1] Thus, where the state has a special property interest in a natural resource, such as fish or wild game found therein, the state may prevent or regulate the export of fish or game even if interstate commerce is indirectly affected by the restriction.[2] Accordingly, a state statute restricting the processing of fish, the plain purpose of which is simply to conserve, for food, fish found within the waters of the state, does not contravene the Commerce Clause of the Federal Constitution, even though it also operates on the processing of fish brought into the state from outside.[3] Also, where a statute prohibits the shipment of game out of the state, the delivery of game to a carrier for transportation to a point beyond the boundary of the state constitutes a violation of the statute, although the game, while still in the state, is taken from the carrier by a deputy game warden of the state under process of law.[4]

A state law that on its face discriminates against interstate commerce, and does not represent the least discriminatory alternative of the state to promote any legitimate local purpose in maintaining the ecological balance in state waters, may be found invalid and unenforceable.[5] However, while a state has no authority to absolutely forbid the importation of fish from other states, it may, as a means for the effective enforcement of its own statutes, forbid the sale or possession of fish for sale within the state during a closed season, even though the effect of such legislation is to prohibit the sale of fish imported from other states.[6]

A statute which prohibits the importation of shrimp which have been harvested with commercial fishing technology that may harm sea turtles does not prohibit all importation of shrimp or shrimp products from countries that have not been certified as having taken adequate measures to protect sea turtles, and the government may by regulation permit the importation of individual shipments of shrimp or shrimp products from countries that have not been certified if the exporters represent that

the shipments in question were caught without the use of commercial fishing technology that may adversely affect species of turtles protected by domestic law.[7]

Footnotes

1 Maine v. Taylor, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986).

2 Ex parte Fritz, 86 Miss. 210, 38 So. 722 (1905).

3 Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936).

4 State v. Carson, 147 Iowa 561, 126 N.W. 698 (1910).

5 Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979).

6 Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936).

7 Turtle Island Restoration Network v. Evans, 284 F.3d 1282 (Fed. Cir. 2002).

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

2. Particular Regulation

§ 43. Scope of state regulation of fishing affecting waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5
West's Key Number Digest, States 18.33

The regulatory power of a state extends not only to the taking of its fish, but also to matter affecting the state's fisheries including regulatory authority over the waters inhabited by the fish.[1] Under its police power, the state may regulate and prohibit obstructions in waters, including nonnavigable waters, the beds of which are owned by riparian owners, which tend to keep fish from their natural feeding or breeding grounds.[2]

The general rule is that persons who erect and maintain dams in streams, either navigable or nonnavigable, are under the implied obligation of providing fishways adequate to permit the free migration of fish; and should they fail to do so, the state, under its police power for the preservation of fish within its boundaries, may compel them to do so.[3]

A state's regulation of access to waterfowl in a game management zone was not subject to the Commerce Clause as a regulation of a channel of interstate commerce or an instrumentality thereof.[4]

Footnotes

1 Columbia River Fishermen's Protective Union v. City of St. Helens, 160 Or. 654, 87 P.2d 195 (1939).
As to wildlife conservation, generally, see §§ 60 to 70.

2 Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978).

3 State v. Meek, 112 Iowa 338, 84 N.W. 3 (1900).

[4] Minnesota ex rel. Hatch v. Hoeven, 370 F. Supp. 2d 960 (D.N.D. 2005), judgment aff'd, 456 F.3d 826 (8th Cir. 2006).

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

2. Particular Regulation

§ 44. Scope of state power to require hunting and fishing licenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

A state may require persons wishing to take fish from waters or to hunt to procure a license to do so from the state,[1] and may make it a criminal act for a person to do so without such a license.[2] Licenses may also be required of persons engaged as guides in inland fisheries, as well as those engaged in the occupation of guiding hunters.[3] A special license may be required for the use of a powerboat or sailboat in fishing.[4]

A license tax may be imposed on the business or occupation of those engaged in packing or canning fish or oysters, without being objectionable as a taking of private property for public use without compensation, and without depriving packers of their property without due process of law or denying them equal protection of the laws.[5]

Different fees may be imposed depending upon different conditions, such as the manner in which fish are to be taken or the means used for taking them.[6] Larger fees may be imposed upon those who use larger boats or more efficient appliances without making an illegal discrimination,[7] and a license tax imposed on fish canners may be graduated according to the size of the pack,[8] or a greater license tax may be imposed upon those using certain fish other than for food than is imposed upon those who are processing fish for use as food.[9]

Footnotes

[1] Dapson v. Daly, 257 Mass. 195, 153 N.E. 454, 49 A.L.R. 1496 (1926); Tuttle v. Wood, 35 S.W.2d 1061 (Tex. Civ. App. San Antonio 1930), writ refused, (July 22, 1931).

[2] State v. White, 2017 ME 219, 173 A.3d 544 (Me. 2017) (fishing); Hayden v. Maryland Department of Natural Resources, 242 Md. App. 505, 215 A.3d 827 (2019) ("relaying" oysters); State v. Storms, 2017-Ohio-8658, 101

N.E.3d 14 (Ohio Ct. App. 4th Dist. Gallia County 2017) (hunting deer).

[3] State v. Snowman, 94 Me. 99, 46 A. 815 (1900).

[4] People v. Setunsky, 161 Mich. 624, 126 N.W. 844 (1910).

[5] Leonard v. Earle, 279 U.S. 392, 49 S. Ct. 372, 73 L. Ed. 754 (1929).

[6] Alaska Pacific Fisheries v. Territory of Alaska, 236 F. 52, 4 Alaska Fed. 432 (C.C.A. 9th Cir. 1916).

[7] Toomer v. Witsell, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948) (a state may constitutionally graduate license fees according to the size of the fishing boats used).

[8] Pacific American Fisheries v. Territory of Alaska, 269 U.S. 269, 46 S. Ct. 110, 70 L. Ed. 270, 5 Alaska Fed. 285 (1925).

[9] Alaska Fish Salting & By-Products Co v. Smith, 255 U.S. 44, 41 S. Ct. 219, 65 L. Ed. 489, 5 Alaska Fed. 20 (1921).

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

2. Particular Regulation

§ 45. Scope of state power to regulate time of taking fish and game; closed seasons

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

By virtue of its police power over the preservation of fish and game within its borders, a state may limit the taking of fish and game to certain seasons or periods of time during the year and declare a closed season for the remainder of the year.[1] In computing the period of open and closed seasons under a statute making it unlawful to hunt from a certain day to a certain day, the first-named day is, according to the common-law system of time computation, excluded, and the last, included.[2] As an aid to the enforcement of a statute creating a closed season, the legislature may forbid the possession or sale of the fish during the closed season.[3]

Observation:

A fish and game warden did not violate the Fourth Amendment in performing a vehicle stop of a motorist driving away from a pier where the warden had seen him fishing with a handline, to demand that the motorist display his catch, even though the stop was not at a fixed checkpoint, and even if the warden did not have a reasonable suspicion that the motorist possessed a spiny lobster during the closed season, where the warden returned the spiny lobster he discovered in the motorist's vehicle to the ocean; the intrusion upon the motorist's privacy resulting from the stop was not so significant as to outweigh the justification for the stop.[4]

The state may also restrict the taking of game to certain hours of the day and make it an offense to kill game during other hours.[5]

A statute forbidding the killing of certain animals during specified months should not be construed as prohibiting a person from effecting their death in protection of his or her person or property.[6]

Footnotes

1 Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).

2 State v. Elson, 77 Ohio St. 489, 83 N.E. 904 (1908).

3 Territory v. Hoy Chong, 21 Haw. 39, 1912 WL 1628 (1912).

4 People v. Maikhio, 51 Cal. 4th 1074, 126 Cal. Rptr. 3d 74, 253 P.3d 247 (2011).

5 Marich v. Pennsylvania Game Com'n, 676 A.2d 1325 (Pa. Commw. Ct. 1996).

6 State v. Burk, 114 Wash. 370, 195 P. 16, 21 A.L.R. 193 (1921).
As to taking game in defense of person or property, see § 38.

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

2. Particular Regulation

§ 46. Scope of state power to regulate manner of taking fish and game

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

The regulatory power of the state extends to the manner in which fish or game may be taken.[1] For example, the state may limit the kind of bait, if any, that may be used in fishing,[2] or restrict the manner of taking fish to prohibit devices used to snag fish.[3] It may forbid or restrict the use of nets or seines in particular waters or at particular times, restrict or limit the length of the nets and the size of the meshes, or permit the use of only certain kinds of nets.[4] Regulations in the manner in which fish may be taken may distinguish commercial and recreational fishing.[5]

Observation:

While the state, and not a town as the owner of underwater lands, has authority to regulate and control the right of fishing for migratory marine fish, such as crabs and conchs, from navigable waters, to extent that the manner in which fishermen's attempts to remove migratory fish from the waters require them to disturb the underwater lands, a town may prohibit them from trespassing by placing fishing gear on those lands.[6]

The possession of a net or seine for uses prohibited by statute may be forbidden and made a criminal offense.[7]

Footnotes

1 Toomer v. Witsell, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

2 U.S. v. Ardoin, 431 F. Supp. 493 (W.D. La. 1977).

3 Willaby v. State, 698 S.W.2d 473 (Tex. App. Fort Worth 1985).

4 Pennisi v. Department of Fish & Game, 97 Cal. App. 3d 268, 158 Cal. Rptr. 683 (1st Dist. 1979).
The criminal offenses of leaving an unattended gill net and leaving crab pots in the water for more than five days were strict-liability regulatory offenses. State v. Waterfield, 850 S.E.2d 609 (N.C. Ct. App. 2020).
To establish the commission of simultaneous possession of mullet in excess of the recreational daily bag limit and any gill or other entangling net, the State was required to prove (1) that defendant was in possession of any species of mullet, (2) that the amount of that mullet exceeded the recreational daily bag limit, (3) that defendant also possessed a gill or other entangling net, and (4) that defendant possessed the mullet and net simultaneously. Sasser v. State, 67 So. 3d 1150 (Fla. 2d DCA 2011).

5 Washington Kelpers Ass'n v. State, 81 Wash. 2d 410, 502 P.2d 1170 (1972) (abrogated on other grounds by, Yim v. City of Seattle, 194 Wash. 2d 682, 451 P.3d 694 (2019)).

6 Brookhaven Baymen's Ass'n, Inc. v. Town of Southampton, 85 A.D.3d 1074, 926 N.Y.S.2d 594 (2d Dep't 2011).

7 Miller v. McLaughlin, 281 U.S. 261, 50 S. Ct. 296, 74 L. Ed. 840 (1930).
As to crimes and penalties, see §§ 51 to 55.

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C. Scope of State Regulation

2. Particular Regulation

§ 47. Scope of state power to limit quantity or size of game or fish taken

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

It is within the power of the legislature to limit the amount of game which a hunter may take within a certain period,[1] or to prohibit fishermen from taking or selling fish smaller than a designated length.[2] Also, the prohibition against the taking of oysters under a prescribed size may legally extend to the taking of oysters from private beds.[3]

A state program governing the allocation of lobster and stone crab trap tags, providing for tag reductions in the event of declining stocks and requiring 5,000 in annual sales for restrictive species endorsement was rationally related to legitimate state interests of natural resource protection and regulation of exploitation of the state's natural resources, and thus did not violate the substantive due process rights of commercial fishermen.[4]

Footnotes

1 State v. McCullagh, 96 Kan. 786, 153 P. 557, 11 A.L.R. 980 (1915).

2 State v. Millington, 377 So. 2d 685 (Fla. 1979); State v. Whites Landing Fisheries, LLC, 2017-Ohio-7537, 96 N.E.3d 1236 (Ohio Ct. App. 6th Dist. Erie County 2017).

3 Windsor v. State, 103 Md. 611, 64 A. 288 (1906).

4 Vickers v. Egbert, 359 F. Supp. 2d 1358 (S.D. Fla. 2005).

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

2. Particular Regulation

§ 48. Scope of state power to regulate transportation of fish and game

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Fish 8 to 10
West's Key Number Digest, Game 3.5 to 5

The state, in the exercise of its power to impose regulations for the protection and preservation of its natural resources, may adopt and enforce statutes forbidding or regulating the transportation of fish and game.[1] Such a statute may be made applicable to a common carrier transporting game killed in the state, and intent on its part may be declared immaterial.[2]

A state does not lose its right to control and regulate the transportation of game from within its borders because of the passage of an Act by Congress regulating the hunting seasons on migratory birds, since such state legislation is not inconsistent with the congressional act.[3]

Footnotes

1 Carey v. State of South Dakota, 250 U.S. 118, 39 S. Ct. 403, 63 L. Ed. 886 (1919).

2 Wells Fargo Exp. Co. v. State, 79 Ark. 349, 96 S.W. 189 (1906).
As to offenses, and defenses against charges thereof, see §§ 51 to 55.

3 Carey v. State of South Dakota, 250 U.S. 118, 39 S. Ct. 403, 63 L. Ed. 886 (1919).

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

2. Particular Regulation

§ 49. Scope of state power to regulate possession or sale of fish and game; offering for sale; marking or tagging

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

The state, in the exercise of its power to make regulations for the preservation of game and in order to enforce prohibitions against fishing, may not only prescribe closed seasons during which the taking of fish and game is prohibited, but also forbid the possession of fish and game during the closed season,[1] or the sale, or offering for sale, of fish and game during that time,[2] even though fish and game may have been lawfully taken or killed in open season.[3] The state may also prohibit such specific conduct as the simultaneous possession of mullet in excess of the recreational daily bag limit and any gill or other entangling net.[4] Regulations of the right to hunt or take game, and restrictions as to the possession or disposal of game after it has been reduced to possession, deprive no person of his or her property.[5]

In some statutes particular reference is made to possession of parts of the carcass and under such statutes the possession of parts of the carcass will ordinarily constitute an offense.[6] The state also may permit the catching of fish for consumption but forbid their taking for purposes of sale.[7] Also, similarly, it is within the power of the state to restrict or prohibit at all times the sale of wild game by one having lawful possession of it.[8] A state can also prohibit the offering for sale of taxidermically processed deer heads, regardless of whether deer were native to the state where the applicable statute expresses an intention to prohibit traffic in out-of-state wildlife as well as wildlife native to the state.[9]

Under a statute proscribing the possession of a deer unlawfully taken, possession does not necessarily mean one's own possession but includes a conspirator's possession.[10]

The possession of the carcass of a deer accidentally struck and killed by an automobile is unlawful under a statute penalizing the possession of such a carcass "except as provided in" a statute permitting, under certain restrictions, the hunting of deer with shotgun or bow and arrow, and the killing of deer to prevent damage to crops, fruits, or ornamental trees, or except when lawfully taken or killed outside the state.[11]

The state, in the exercise of its power to impose regulations affecting hunting and fishing may impose marking or tagging requirements on game and fish reduced to possession,[12] including requirements that proper tagging be maintained on hides in possession.[13]

Footnotes

1 State v. Pulos, 64 Or. 92, 129 P. 128 (1913); State v. Pollock, 42 S.D. 360, 175 N.W. 557 (1919).

2 Union Fishermen's Co-operative Packing Co. v. Shoemaker, 98 Or. 659, 193 P. 476 (1920).

3 People v. Clair, 221 N.Y. 108, 116 N.E. 868 (1917).

4 Sasser v. State, 67 So. 3d 1150 (Fla. 2d DCA 2011).

5 Commonwealth v. Worth, 304 Mass. 313, 23 N.E.2d 891, 125 A.L.R. 1196 (1939).

6 Jewell v. Hempleman, 210 Wis. 265, 246 N.W. 441 (1933).

7 State v. Dow, 70 N.H. 286, 47 A. 734 (1900).

8 People v. Clair, 221 N.Y. 108, 116 N.E. 868 (1917); Graves v. Dunlap, 87 Wash. 648, 152 P. 532 (1915).

9 State, Dept. of Environmental Protection and Energy, Div. of Fish, Game and Wildlife v. Santomauro, 261 N.J. Super. 339, 618 A.2d 917 (App. Div. 1993).

10 State v. Ballou, 127 Vt. 1, 238 A.2d 658 (1968).

11 Commonwealth v. Worth, 304 Mass. 313, 23 N.E.2d 891, 125 A.L.R. 1196 (1939).

12 Blobner v. Com., 144 Pa. Commw. 100, 600 A.2d 708 (1991); State v. Sullivan, 154 Vt. 437, 578 A.2d 639 (1990).

13 State v. Earl, 242 Mont. 279, 790 P.2d 464 (1990).

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III. State and Local Regulation of Hunting and Fishing

C. Scope of State Regulation

2. Particular Regulation

§ 50. Scope of state power to prevent waste in relation to fish and game

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

West's Key Number Digest, Game 3.5 to 5

The state, in the exercise of its power to impose regulations affecting hunting and fishing may prohibit wanton waste, in conjunction with regulations criminalizing the transportation of illegally killed game.[1] Statutes which prohibit the waste of food fish or the use, in reduction plants, of fish fit for human consumption, in pursuance of the public policy which aims to protect and conserve food fish for the benefit of present and future generations of the people of the state and the devotion of such fish to the purposes of human consumption, may be a valid exercise of the police power of the state regulating the possession and use of fish.[2] Such regulatory provisions are not unreasonable or discriminatory.[3]

A proviso to a statute forbidding the use of food fish for reduction purposes, which permits those engaged in catching or dealing in fish for human consumption, and those engaged in canning or preserving fish for such consumption, to apply for permits to use them in reduction plants, which permits may be granted upon certain conditions, is not unreasonable or discriminatory.[4]

Observation:

A particular state statute, setting forth reimbursable damages for the unlawful killing, possession or waste of wild animals, is written in such a manner that there are two distinct lists of reimbursable damage assessments: one that applies to any illegal killing, possession, or waste of the enumerated animals; and the second that applies to flagrant violations involving the illegal killing, possession, or waste of trophy big game animals.[5]

Footnotes

1 Gudmundson v. State, 822 P.2d 1328 (Alaska 1991).

2 People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186 (1925).

3 Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936).

4 People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186 (1925).

5 State v. Hughes, 161 Idaho 826, 392 P.3d 4 (Ct. App. 2014).

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D. Crimes and Penalties

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West's Key Number Digest, Fish 13 to 17

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III. State and Local Regulation of Hunting and Fishing

D. Crimes and Penalties

§ 51. State power to enact criminal laws pertaining to fish and game and to penalize violations, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 13 to 17

West's Key Number Digest, Game 7 to 10

To secure the enforcement of restrictions on the taking of fish and game, the state may make it a criminal offense to do so in violation of its regulations.[1] While even the possession of specified appliances for taking fish or game for unlawful purposes may be declared a crime, as a general rule such penal statutes are to be strictly construed in favor of the accused, and only those acts expressly condemned by the statute are punishable.[2]

Fish and game laws may be enforced by the imposition of a fine[3] or imprisonment.[4] Statutes which impose a fine or penalty for each individual fish, bird or animal unlawfully taken or found in possession are valid notwithstanding arguments that they impose excessive fines or punishments.[5] Accordingly, a fine of $10,000 for the illegal importation of more than 15,000 underweight lobster tails is reasonable where the importer ran his importing business alone, had been in the importing business for years, purchased the tails himself in South Caicos, and was present when they were packed for shipping, because it is reasonable to conclude that the importer knew of the weight requirements and of the likelihood that the tails did not meet the weight requirement for export under Turks and Caicos law.[6]

Under some authority, an order of restitution may also be appropriately imposed against persons convicted of criminal violations of fishing regulations.[7]

Footnotes

1 State v. Reed, 75 S.D. 282, 63 N.W.2d 792 (1954).

2 People v. Buffalo Fish Co., 164 N.Y. 93, 58 N.E. 34 (1900).

[3] State v. Poole, 93 Minn. 148, 100 N.W. 647 (1904); State v. Waterfield, 850 S.E.2d 609 (N.C. Ct. App. 2020); Villa v. Thayer, 92 Vt. 81, 101 A. 1009 (1917).

[4] Villa v. Thayer, 92 Vt. 81, 101 A. 1009 (1917).

[5] In re Schwartz, 119 La. 290, 44 So. 20 (1907); State v. Poole, 93 Minn. 148, 100 N.W. 647 (1904) (upholding a fine of $10 for each illegally possessed duck, imposed upon defendants having 2,000 ducks).

[6] U.S. v. Proceeds from Sale of Approximately 15,538 Panulirus Argus Lobster Tails, 834 F. Supp. 385 (S.D. Fla. 1993).

[7] State /Division of Wildlife v. Coll, 2017-Ohio-7270, 96 N.E.3d 947 (Ohio Ct. App. 6th Dist. Sandusky County 2017).

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III. State and Local Regulation of Hunting and Fishing

D. Crimes and Penalties

§ 52. Intent under state criminal laws pertaining to fish and game; strict liability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 13 to 17

West's Key Number Digest, Game 7 to 10

Conviction for some statutes enforcing hunting and fishing regulations may require a mens rea intent or criminalize negligent violations.[1] However, intent is usually not an element necessary to prove to show a conviction for a violation of hunting or fishing offenses, unless made so by the statute, and the legislature may make the possession of certain fish or game in closed season a criminal offense, irrespective of the intent of the possessor.[2] For example, regulations prohibiting taking of resources from a state marine conservation area and requiring traps to contain destruction devices are public welfare offenses to which strict liability applies, where both provisions were passed to promote the health and well-being of the state's living marine resources, misdemeanor penalties are imposed for violations, and it would be difficult for the prosecution to prove that a defendant intended to place traps in a state marine conservation area and/or without operable destruction devices, rather than having done so inadvertently.[3] In addition, possession of illegal fishtraps is a strict-liability offense, in light of the fact that no mental state for culpability is required.[4] Also, the offenses of wrongfully possessing a state resident hunting license and of killing elk without having a proper class license have been held not to require proof of specific criminal intent,[5] and a misdemeanor offense of hunting on posted land without permission which contains no culpability requirement is therefore a strict-liability offense.[6]

Observation:

Since scienter or guilty knowledge was not an element of the charged offense concerning illegal taking of walleye by commercial means, the holder of a commercial seining permit could be held strictly liable for any walleye illegally taken by his crew, regardless of whether he knew of their actions.[7]

Footnotes

[1] Waiste v. State, 808 P.2d 286 (Alaska Ct. App. 1991) (intent was element of using drift gill net while not drifting, even though statute criminalizes negligent violation of regulation).
In a statute providing for revocation of authorization to catch oysters if a person has "knowingly committed" a violation of oyster harvesting regulations, the term "knowingly" means deliberately or intentionally, and does not require proof that the licensee is subjectively aware that his or her act is unlawful. Hayden v. Maryland Department of Natural Resources, 242 Md. App. 505, 215 A.3d 827 (2019).

[2] U.S. v. Catlett, 747 F.2d 1102 (6th Cir. 1984) (scienter is not required for conviction for taking migratory birds on or over baited field); Cummings v. Com., 255 S.W.2d 997 (Ky. 1953).

[3] People v. Wetle, 43 Cal. App. 5th 375, 256 Cal. Rptr. 3d 646 (6th Dist. 2019).

[4] State v. Taylor, 580 So. 2d 1102 (La. Ct. App. 4th Cir. 1991) (criminal intent is not element of offense of unlawfully taking oysters from state water bottoms); State v. Seamen's Club, 1997 ME 70, 691 A.2d 1248 (Me. 1997) (crime of possession of short lobsters does not require culpable mental state); State v. Brandner, 551 N.W.2d 284 (N.D. 1996).

[5] State v. Wimer, 118 Idaho 732, 800 P.2d 128 (Ct. App. 1990).

[6] State v. Brandborg, 2014 ND 228, 857 N.W.2d 83 (N.D. 2014).

[7] Koch v. Ohio Dept. of Natural Resources, 95 Ohio App. 3d 193, 642 N.E.2d 27 (10th Dist. Franklin County 1994).

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III. State and Local Regulation of Hunting and Fishing

D. Crimes and Penalties

§ 53. Defenses under state criminal laws pertaining to fish and game

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 13 to 17

West's Key Number Digest, Game 7 to 10

When a particular violation of the fish and game laws is a strict-liability offense, defendant will not be permitted to present evidence on a defense such as depredation.[1] Otherwise, however, the defense of taking game in defense of a person or property may be available.[2] Also, a necessity defense may be available as a defense to the killing of an injured game animal out of season, on the theory that the animal was already wounded and that the killing was necessary to prevent any further suffering. However, such a claim would not be available as a defense to a charge of controlling or possessing that animal, after it was killed, outside of the hunting season.[3] Accordingly, a defendant, who was charged with the misdemeanor possession of an unlawfully taken bobcat pelt, was not entitled to submit to the jury the issue as to whether the bobcat was taken by him in defense of his son whom the bobcat was allegedly attacking where the defendant had possessed the bobcat pelt for more than 72 hours without having reported acquiring the pelt as required.[4]

Generally, it is no defense that the person did not know their conduct was unlawful.[5] The defense of legal impossibility will not preclude the conviction of a defendant, who shoots a deer decoy, of attempting to take wild deer out of season.[6] In citations for taking deer during closed season and wasting game, the state is not required to negate the possible defense that the defendant is a Native American.[7]

Where the right of nonresidents to shoot or fish in the state can exist only as an incident to their ownership of land therein on which they hunt or fish, a deed granting them only the right to hunt and fish, and this to revert upon abandonment, gives no defense against the game law.[8] The fact that a person convicted of fishing without a license is employed by one properly licensed is no defense to such a prosecution.[9]

While entrapment or outrageous government conduct may constitute a defense, where a defendant fails to establish that the government's conduct was outrageous in connection with an officer's hunting, taking, and wasting game as part of an undercover operation, and there was no evidence that the state engineered a criminal enterprise in which defendant was involved or generated crimes merely for the sake of prosecuting defendant, such a defense will fail.[10]

A "first in time, first in right" defense may be available in response to criminal charges for violating the minimum distance between units of fishing gear, even though it is a strict-liability offense.[11]

Footnotes

1 State v. Kleppe, 2011 ND 141, 800 N.W.2d 311 (N.D. 2011).

2 § 38.

3 State v. Bailey, 77 Wash. App. 732, 893 P.2d 681 (Div. 3 1995), as amended on denial of reconsideration, (June 28, 1995).

4 State v. Gibbs, 244 Mont. 251, 797 P.2d 928 (1990).

5 Scudero v. State, 917 P.2d 683 (Alaska Ct. App. 1996).
Because a person is on notice that they are subject to the rules of the Department of Fish, Wildlife, and Parks related to the management of wildlife, it is no defense that they were ignorant of those rules or the law, or that they relied on statements from an adjoining property owner. State v. McGregor, 2017 MT 156, 388 Mont. 63, 398 P.3d 241 (2017).

6 State v. Curtis, 157 Vt. 629, 603 A.2d 356 (1991).

7 State v. Herrera, 152 Or. App. 22, 952 P.2d 566 (1998).

8 Kenner v. State, 121 Ark. 95, 180 S.W. 492 (1915).

9 State v. Catholic, 75 Or. 367, 147 P. 372 (1915).

10 State v. Romero, 279 Mont. 58, 926 P.2d 717 (1996).

11 Clucas v. State, 815 P.2d 384 (Alaska Ct. App. 1991).

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D. Crimes and Penalties

§ 54. Prosecutions under state criminal laws pertaining to fish and game, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 13 to 17

West's Key Number Digest, Game 7 to 10

Where a culpable mental state is a required element of the offense, a complaint must allege the culpable mental state.[1] However, a jury instruction as to mens rea may not be warranted where the court's instructions adequately and correctly convey the elements of the crime to the jury, and the requirement that the defendant must have acted knowingly is apparent from the plain language of the statute.[2]

The burden of proof in prosecutions for violations of fish laws, and the evidence admissible to establish that burden and to meet the case made by the proof introduced by the state in the discharge of the burden upon it, are governed by the general principles of the law of evidence as applied in criminal prosecutions.[3] Thus, a conviction for fishing without a license cannot be sustained by circumstantial evidence consisting of the presence of the defendant as a guest passenger in an automobile returning with fish and fishing apparatus from the scene of the fishing, where it appeared from the evidence of the state that five unidentified persons were engaged in the fishing, that four of the seven persons in the car had fishing licenses, and that the condition of the defendant's clothes indicated that he was not the fifth fisherman.[4] Also, the evidence was insufficient to support defendant's convictions for prevention of hunting by creating noise and possession of criminal tools, where the explanation of circumstances underlying the trial court's guilty findings consisted of the prosecutor reading a brief summary of the police report and answers to the trial court's questions regarding the properties at issue and whether defendant was lawfully at the property in question at the time of the incident, and nothing in the explanation of the circumstances indicated that defendant knew another person was attempting to hunt when she was making noise with maracas or that she was using the maracas to affect the behavior of the wild animal being hunted.[5]

As in any criminal prosecution, expert witnesses in a prosecution under the fish and game laws must be qualified regarding the subject matter of their testimony.[6] Also, the jury is free to reject defendant's testimony offering a noncriminal explanation for his or her behavior.[7]

The state may adopt a prima facie standard as evidence of the offense without depriving the defendants of their right to a presumption of innocence where the standard has a reasonable relationship between the acts giving rise to the prima facie

evidence and the main fact to be proved.[8] Accordingly, the flashing or display of any artificial light from a roadway or public or private driveway in any locality or area frequented or inhabited by wild deer, accompanied by the possession of a firearm or bow and arrow during the hours between sunset and sunrise would constitute prima facie evidence of a violation of the night hunting statute.[9] Also, possession of guns and a light during statutorily specified hours in an area where deer might be found and in a manner capable of disclosing the presence of the deer was prima facie evidence of an intent to violate the statute proscribing the illegal taking and possession of deer and wild turkeys during such hours.[10]

Footnotes

1 Vinson v. State, 626 S.W.2d 536 (Tex. Crim. App. 1981).
As to mental state requirements in hunting and fishing offenses, generally, see § 52.

2 State v. Siracusa, 2017 ME 84, 160 A.3d 531 (Me. 2017) (the fact that a person had to know that he was taking part in a deer drive to be guilty of that offense was apparent from the plain language of the statute, which required the State to prove that a person had participated in a planned or organized event).

3 State v. Bates, 76 S.D. 23, 71 N.W.2d 641 (1955) (abrogated on other grounds by, State v. Plastow, 2015 SD 100, 873 N.W.2d 222 (S.D. 2015)).

4 Washburn v. State, 90 Okla. Crim. 306, 213 P.2d 870, 15 A.L.R.2d 751 (1950).

5 City of Seven Hills v. McKernan, 2019-Ohio-1001, 124 N.E.3d 898 (Ohio Ct. App. 8th Dist. Cuyahoga County 2019).

6 State v. Whites Landing Fisheries, LLC, 2017-Ohio-7537, 96 N.E.3d 1236 (Ohio Ct. App. 6th Dist. Erie County 2017).

7 State v. Siracusa, 2017 ME 84, 160 A.3d 531 (Me. 2017).

8 State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971).

9 State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971).

10 Williams v. State, 239 So. 2d 583 (Fla. 1970).

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D. Crimes and Penalties

§ 55. Forfeitures and seizures under state criminal laws pertaining to fish and game

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 13 to 17

West's Key Number Digest, Game 7 to 10

The state has the power to punish a violation of its fish and game laws by the forfeiture of the apparatus used in the illegal taking of such fish and game[1] as well as forfeiture of the illegal game or fish, or the proceeds obtained therefrom.[2] Among equipment that is subject to forfeiture are boats used in taking fish or marine organisms illegally,[3] as well as such items as an automobile and boat trailer used in illegal shocking of fish,[4] and the gun and truck used in illegal night hunting.[5]

Some violations of fishing laws may impose forfeiture as an appropriate remedy without imposing criminal liability.[6]

An innocent owner exception exists under forfeiture statutes for illegal hunting and fishing, although to establish the innocent owner exception to a statute providing for the forfeiture of contraband wildlife and devices, a claimant must establish either the lack of knowledge or the lack of consent.[7] Generally, forfeiture proceedings under a game code are in rem proceedings, rather than in personam. Such proceedings must comport with due process of law,[8] and the owner of the property subject to forfeiture proceedings is entitled to notice of the initiation of a forfeiture proceeding and to an evidentiary hearing on the forfeiture separate from the criminal hearing.[9] However, some states may allow forfeiture proceedings in conjunction with criminal charges without requiring a separate in rem proceeding.[10]

Where the defendant has committed a strict-liability offense, the trial court may not, in ordering a forfeiture, properly consider that defendant has expressed no remorse for his or her unlawful conduct.[11]

The conviction of an individual offender of violation of the fishing laws is not a prerequisite to the maintenance of a forfeiture of the apparatus used in illegal fishing.[12] In the absence of a statute empowering the game warden to destroy the property which is being used illegally to capture or kill game, the game warden is liable for the destruction of such property, although it is the only effective means he or she has for protecting game.[13]

Footnotes

[1] State v. Thompson, 204 So. 3d 1019 (La. Ct. App. 4th Cir. 2016); State v. Fishing Vessel, Flying Yankee, 589 A.2d 461 (Me. 1991); State v. Foley, 125 Or. App. 423, 865 P.2d 465 (1993); State v. Cunningham, 995 S.W.2d 638 (Tenn. Crim. App. 1999); State v. Yates, 834 P.2d 599 (Utah Ct. App. 1992).

[2] McNabb v. State, 860 P.2d 1294 (Alaska Ct. App. 1993), as amended on reh'g in part, (Nov. 26, 1993); People v. Estes, 218 Cal. App. 4th Supp. 14, 161 Cal. Rptr. 3d 690 (App. Dep't Super. Ct. 2013); State v. Wingate, 668 So. 2d 1324 (La. Ct. App. 1st Cir. 1996), writ denied, 672 So. 2d 924 (La. 1996); Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife, 144 Ohio St. 3d 278, 2015-Ohio-3731, 42 N.E.3d 718 (2015); State v. Kelly, 123 Or. App. 528, 860 P.2d 843 (1993).

[3] State v. Thompson, 204 So. 3d 1019 (La. Ct. App. 4th Cir. 2016); State v. Fishing Vessel, Flying Yankee, 589 A.2d 461 (Me. 1991).

[4] One 1992 Toyota 4-Runner, Vin No. JT3VN39W2N8034941 v. State ex rel. Mississippi Dept. of Wildlife Fisheries and Parks, 721 So. 2d 609 (Miss. 1998).

[5] Crow v. State, 56 Ark. App. 100, 938 S.W.2d 874 (1997).

[6] State v. Ahrling, 191 Wis. 2d 398, 528 N.W.2d 431 (1995) (commercial clamming without license or permit is merely subject to forfeiture, and is not felony offense).

[7] Threlkeld v. State ex rel. Mississippi Dept. of Wildlife Fisheries and Parks, 586 So. 2d 756 (Miss. 1991).

[8] State v. Billiot, 254 La. 988, 229 So. 2d 72 (1969).

[9] Reeves v. Pennsylvania Game Com'n, 136 Pa. Commw. 667, 584 A.2d 1062 (1990).

[10] Crow v. State, 56 Ark. App. 100, 938 S.W.2d 874 (1997).

[11] People v. Estes, 218 Cal. App. 4th Supp. 14, 161 Cal. Rptr. 3d 690 (App. Dep't Super. Ct. 2013).

[12] Department of Wild Life & Fisheries v. The Trawler Baltimore No. 218839, 213 La. 956, 36 So. 2d 1, 3 A.L.R.2d 733 (1948).

[13] Villa v. Thayer, 92 Vt. 81, 101 A. 1009 (1917).

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IV. Federal Wildlife Conservation and Protection Acts

A. In General

§ 56. National Wildlife Refuge System Administration Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551, 740, 742

West's Key Number Digest, Fish 8, 9, 12 to 16
West's Key Number Digest, Game 3.5, 4, 7 to 10

A federal statute provides for the consolidation of authorities relating to the various categories of areas administered by the Secretary of the Interior for the conservation of fish and wildlife, by designating such areas as the National Wildlife Refuge System, to be administered by the Secretary through the United States Fish and Wildlife Service.[1] The statute gives the Secretary complete administrative and management authority over national refuges.[2] The Secretary is authorized to (1) enter into contracts for the provision of public accommodations to the extent the Secretary determines will not be inconsistent with the primary purposes of the affected area; (2) accept donations of funds; (3) acquire lands or interests therein in exchange for (a) acquired lands or public lands, or interests therein; or (b) the right to remove products from the acquired or public lands within the System; (4) enter into cooperative agreements with state fish and wildlife agencies for management of programs on a refuge; and (5) issue regulations to carry out the statute.[3] The statute generally prohibits disturbing or injuring any property of the United States within the System, including wild animals, except as provided by law or permit.[4] The Secretary may issue permits for the use of any area within the System for any purpose, including hunting, fishing, public recreation and accommodations, and access, whenever he or she determines that such uses are compatible with the major purposes for which such areas were established.[5] The Secretary may also permit the use of, or grant easements regarding, any areas within the System such as (but not limited to) power and telephone lines, canals, ditches, pipelines, and roads.[6] Violations of the statute or regulations issued thereunder are punishable as criminal offenses.[7]

Observation:

The National Wildlife Refuge System Improvement Act (NWRSIA) preempted a state statute, which banned the use of any steel-jawed leghold animal trap by any person, including a federal employee, since the ban conflicted with the statutory management authority of the Fish and Wildlife Service (FWS) on national wildlife refuge land.[8] Moreover, under the National Wildlife Refuge System Improvement Act (NWRSIA), federal management and regulation of federal wildlife refuges preempts state management and regulation of such refuges to the extent the two actually conflict, or where state management and regulation

stand as an obstacle to the accomplishment of the full purposes and objectives of the federal government.[9]

Footnotes

1 16 U.S.C.A. § 668dd(a).

2 Wyoming v. U.S., 61 F. Supp. 2d 1209 (D. Wyo. 1999), aff'd in part, rev'd in part on other grounds, 279 F.3d 1214 (10th Cir. 2002).

3 16 U.S.C.A. § 668dd(b).

4 16 U.S.C.A. § 668dd(c).
The evidence was sufficient to establish that wetlands drained by the defendant existed at time a wetlands easement was conveyed to the Fish and Wildlife Service (FWS) by defendant's parents 40 years earlier, as required to support a conviction for draining wetlands on property encumbered by a federal wetlands easement, where a FWS wildlife biologist testified that an aerial photograph taken four years before the conveyance depicted wetlands that were of the same approximate size, shape, and location as the drained wetlands. U.S. v. Peterson, 632 F.3d 1038 (8th Cir. 2011).

5 16 U.S.C.A. § 668dd(d)(1)(A).

6 16 U.S.C.A. § 668dd(d)(1)(B).

7 16 U.S.C.A. § 668dd(f).
The statute prohibiting persons from disturbing property within the National Wildlife Refuge System (NWRS) other than knowingly did not create strict-liability offense, but instead required that such persons act at least with the mens rea of simple negligence, and thus unless defendant knew or should have known that carrying out a drainage project on his own land would disturb NWRS property, his conduct was innocent. United States v. Mast, 938 F.3d 973 (8th Cir. 2019).
The offense of injuring property of the United States in an area of the National Wildlife Refuge System, by draining water from easement land for irrigation purposes, was a petty offense, so that the defendant was not entitled to a jury trial, since the defendant faced a maximum penalty of six months' imprisonment and a $500 fine and since the offense was malum prohibitum rather than malum in se. U.S. v. Seest, 631 F.2d 107 (8th Cir. 1980).

8 National Audubon Society, Inc. v. Davis, 307 F.3d 835 (9th Cir. 2002), opinion amended on other grounds on denial of reh'g, 312 F.3d 416 (9th Cir. 2002).

9 Wyoming v. U.S., 279 F.3d 1214 (10th Cir. 2002).

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A. In General

§ 57. Fish and Wildlife Coordination Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 8, 9, 12 to 16

West's Key Number Digest, Game 3.5, 4, 7 to 10

The Fish and Wildlife Coordination Act[1] provides that the conservation of fish and other wildlife shall receive equal consideration and be coordinated with other features of water-resource development programs, and authorizes the Secretary of the Interior to provide assistance to, and cooperate with, federal, state, and public and private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife.[2] The Act authorizes the cooperation of the various states in the management of wildlife and wildlife habitat on lands acquired by the federal government and administered by its agencies.[3]

Practice Tip:

While the Act requires governmental agencies to coordinate their activities so that adverse effects on fish and wildlife will be minimized,[4] there is no private right of action under the Act;[5] rather, a government agency's compliance with the Act is subject to review as part of an action brought under the National Environmental Policy Act (NEPA) to challenge the sufficiency of the agency's environment impact statement issued pursuant to that Act.[6]

The Fish and Wildlife Coordination Act (FWCA) does not contain a citizen-suit provision authorizing action by environmental and fishing groups against the Corps of Engineers, although the groups' claims could be asserted through the private right of action created in NEPA.[7]

Footnotes

[1] 16 U.S.C.A. §§ 661 to 667h.

[2] 16 U.S.C.A. § 661(b).
The provision of the Fish and Wildlife Coordination Act of 1958 granting limited new authorities to the Secretary of the Interior does not impose any duty on the United States Army Corps of Engineers to give equal consideration to fish and wildlife conservation as a coequal purpose of all Corps projects. In re ACF Basin Water Litigation, 467 F. Supp. 3d 1323 (N.D. Ga. 2020).

[3] U.S. v. 67.59 Acres of Land, More or Less, in Huntingdon County, Com. of Pa., 415 F. Supp. 544 (M.D. Pa. 1976).

[4] Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972).

[5] Texas Committee on Natural Resources v. Marsh, 736 F.2d 262 (5th Cir. 1984), on reh'g, 741 F.2d 823 (5th Cir. 1984).

[6] Texas Committee on Natural Resources v. Marsh, 736 F.2d 262 (5th Cir. 1984), on reh'g, 741 F.2d 823 (5th Cir. 1984).
As to the National Environmental Policy Act and environmental impact statements issued thereunder, see Am. Jur. 2d, Pollution Control §§ 82 to 142.

[7] Raymond Proffitt Foundation v. U.S. Army Corps of Engineers, 175 F. Supp. 2d 755 (E.D. Pa. 2001), aff'd on other grounds, 343 F.3d 199 (3d Cir. 2003).

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A. In General

§ 58. Airborne Hunting Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Game 4, 7, 9, 10

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Validity, Construction, and Application of Airborne Hunting Act, 16 U.S.C.A. s 742j-1, 179 A.L.R. Fed. 527

Under the Airborne Hunting Act, subject to certain exceptions,[1] any person who (1) while airborne in an aircraft shoots or attempts to shoot for the purpose of capturing or killing any bird, fish, or other animal; or (2) uses an aircraft to harass any bird, fish, or other animal; or (3) knowingly participates in using an aircraft for any purpose referred to above will be subject to fine or imprisonment.[2] This Act unambiguously by the use of the disjunctive word "or" creates a penalty for aerial harassment of animals, independent of shooting or attempting to shoot.[3] The prohibition of the Act against using "aircraft" to harass wildlife applies to power parachutes, since the statute broadly defines "aircraft" to include "any contrivance used for flight in the air,"[4] and applying the prohibitions to parachutes does not conflict with congressional intent.[5] The Act is within Congress's commerce clause authority, as it substantially affects interstate commercial activity of hunting and serves as a national program with direct and substantial effects on interstate commerce.[6] Also, powered parachutes are not restricted to nonnavigable airspace, and thus the Act, as applied to powered parachutes, validly regulates, under the Commerce Clause, the use of the channel of interstate commerce, the navigable airspace.[7]

The Airborne Hunting Act also provides for the forfeiture to the United States of all birds, fish, or other animals shot or captured contrary to the provisions of the Act or of any regulation issued thereunder, and all guns, aircraft, and other equipment used to aid in the shooting, attempting to shoot, capturing or harassing any bird, fish, or other animal in violation of the Act or of any regulation issued thereunder.[8] An interpretation of the Airborne Hunting Act to allow forfeiture based entirely on violation of the prohibition against aerial harassment of animals, did not conflict with the legislative intent in enacting the statute, since the extension of the forfeiture penalty beyond the mere shooting from an aircraft to the target harassment of wildlife is consistent with the congressional desire to eliminate "unsportsmanlike behavior."[9]

Footnotes

[1] 16 U.S.C.A. § 742j-1(b).

[2] 16 U.S.C.A. § 742j-1(a).

[3] U.S. v. Red Frame Parasail, Buckeye Model Eagle 503 (serial number 4159), 160 F. Supp. 2d 1048, 179 A.L.R. Fed. 769 (D. Ariz. 2001).

[4] 16 U.S.C.A. § 742j-1(c).

[5] U.S. v. Red Frame Parasail, Buckeye Model Eagle 503 (serial number 4159), 160 F. Supp. 2d 1048, 179 A.L.R. Fed. 769 (D. Ariz. 2001).

[6] U.S. v. Red Frame Parasail, Buckeye Model Eagle 503 (serial number 4159), 160 F. Supp. 2d 1048, 179 A.L.R. Fed. 769 (D. Ariz. 2001).

[7] U.S. v. Red Frame Parasail, Buckeye Model Eagle 503 (serial number 4159), 160 F. Supp. 2d 1048, 179 A.L.R. Fed. 769 (D. Ariz. 2001).

[8] 16 U.S.C.A. § 742j-1(e).

[9] U.S. v. Red Frame Parasail, Buckeye Model Eagle 503 (serial number 4159), 160 F. Supp. 2d 1048, 179 A.L.R. Fed. 769 (D. Ariz. 2001).

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IV. Federal Wildlife Conservation and Protection Acts

A. In General

§ 59. Lacey Act (control of illegally taken fish and wildlife)

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8, 9, 12 to 16

West's Key Number Digest, Game 3.5, 4, 7 to 10

A.L.R. Library

Construction and Application of 16 U.S.C.A. ss3371 to 3378, Enacted by Lacey Act Amendments of 1981, Pub.L. 97-79, Nov. 16, 1981, 95 Stat. 1073, Governing Control of Illegally Taken Fish and Wildlife, 69 A.L.R. Fed. 2d 189

The Lacey Act[1] prohibits a variety of actions in connection with the illegal taking of fish and wildlife, including:

- importing, exporting, transporting, selling, receiving, acquiring, or purchasing any such fish or wildlife[2]
- failing to comply with certain marking requirements[3]
- offering to provide, for money or other consideration, guiding, outfitting, or other services, or a hunting or fishing license or permit for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife subject to the Act[4]
- engaging in false labeling of fish or wildlife subject to the Act[5]

Persons who violate the Act are subject to civil penalties, assessed and reviewed as provided by statute,[6] and to criminal penalties[7] and permit sanctions,[8] as well as forfeitures.[9] Administrative regulations have been issued to govern the assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property under the Act.[10]

Footnotes

[1] 16 U.S.C.A. §§ 3371 to 3378.

[2] 16 U.S.C.A. § 3372(a).
Exceptions to such prohibitions are set forth in 16 U.S.C.A. § 3377.

[3] 16 U.S.C.A. § 3372(b).

[4] 16 U.S.C.A. § 3372(c).

[5] 16 U.S.C.A. § 3372(d).

[6] 16 U.S.C.A. § 3373(a) to (c).

[7] 16 U.S.C.A. § 3373(d).

[8] 16 U.S.C.A. § 3373(e).

[9] 16 U.S.C.A. § 3374.

[10] 15 C.F.R. Pt. 904 (National Oceanic and Atmospheric Administration, Department of Commerce).

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B. Endangered Species Act

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Research References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551, 647, 650 to 652, 659, 722

West's Key Number Digest, Fish 8, 9, 12 to 16
West's Key Number Digest, Game 3.5, 4, 7 to 10

A.L.R. Library

A.L.R. Index, Endangered Species
A.L.R. Index, Fish and Game
A.L.R. Index, Wildlife
West's A.L.R. Digest, Environmental Law 511 to 551, 647, 650 to 652, 659, 722
West's A.L.R. Digest, Fish 8, 9, 12 to 16
West's A.L.R. Digest, Game 3.5, 4, 7 to 10

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B. Endangered Species Act

§ 60. Endangered Species Act, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 544, 548 to 551

West's Key Number Digest, Fish 8, 9, 12
West's Key Number Digest, Game 3.5, 4

A.L.R. Library

Construction and Application of State Endangered Species Acts, 44 A.L.R.6th 325

Construction and Application of the Cooperation with States Requirement under Sec. 6 of the Endangered Species Act of 1973, 16 U.S.C.A. s1535, 8 A.L.R. Fed. 3d Art. 3

Construction and Application of Exceptions Under s10 of the Endangered Species Act of 1973, 16 U.S.C.A. s1539, 2 A.L.R. Fed. 3d Art. 2

Standard of Review Under the Endangered Species Act of 1973, 16 U.S.C.A. secs. 1531 to 1544, 93 A.L.R. Fed. 2d 121

Validity, construction, and application of Endangered Species Act of 1973 (16 U.S.C.A. secs. 1531-1543), 32 A.L.R. Fed. 332

The Federal Endangered Species Act (ESA)[1] was enacted based on the congressional findings, among others, that various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation, and that other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction.[2] The Act establishes a scheme under which any species which is deemed "endangered" or "threatened" is protected from various private and governmental activities which will or may jeopardize its continued existence.[3] The purposes of the ESA are to provide a means whereby the ecosystem upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in the Act.[4] Simply stated, the ESA is aimed at protecting endangered and

threatened species and the ecosystems on which they depend.[5] Beyond that, the purpose of the ESA is to ensure the recovery of endangered and threatened species, not merely the survival of their existing numbers.[6]

The responsibility for administering and enforcing the ESA falls to the National Marine Fisheries Service for marine life and the Fish and Wildlife Service for terrestrial life.[7]

That the Endangered Species Act may have been enacted for a noneconomic purpose did not provide grounds for finding it to be an unconstitutional exercise of Congress's Commerce Clause authority, inasmuch as Congress had the power to act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity.[8]

Footnotes

1 16 U.S.C.A. §§ 1531 to 1544.

2 16 U.S.C.A. § 1531(a).

3 As to the listing of a species as "endangered" or "threatened" for the purposes of the Act, see § 62.

4 16 U.S.C.A. § 1531(b).

5 Pacific Rivers Council v. Thomas, 936 F. Supp. 738 (D. Idaho 1996).

6 Alaska Oil and Gas Ass'n v. Jewell, 815 F.3d 544 (9th Cir. 2016).

7 Westlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853 (9th Cir. 2004); Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096 (10th Cir. 2010).

8 Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (holding that a real estate development company's proposed commercial housing project had the requisite substantial relation to interstate commerce, and therefore the government's regulation of the project, by applying the Endangered Species Act's (ESA) restrictions on the takings of protected species to protect endangered species of toad found in the proposed development area, did not violate the Commerce Clause, even though the toad did not travel outside of the state and the proposed development was located wholly within the state).

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B. Endangered Species Act

§ 61. Relationship of Endangered Species Act to state law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 544, 548 to 551

West's Key Number Digest, Fish 8, 9, 12
West's Key Number Digest, Game 3.5, 4

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Construction and Application of State Endangered Species Acts, 44 A.L.R.6th 325

Validity, construction, and application of Endangered Species Act of 1973 (16 U.S.C.A. secs. 1531-1543), 32 A.L.R. Fed. 332

The Endangered Species Act (ESA), enacted in 1973, encouraged the states to pass similar legislation, and all the states complied. These state statutes comprehensively cover the fields of conservation, protection, and restoration of endangered or threatened species of fish and wildlife, empowering local and state agencies, providing a procedure for listing or delisting endangered species, and mandating consideration of the impact on endangered species of development projects.[1] A state's law concerning the taking of an endangered or threatened species may be more restrictive than the relevant provisions of the Federal Endangered Species Act, but cannot be less restrictive.[2] To the extent that a state's law on "taking" endangered or threatened species is less protective of those species than the Act, such state law is preempted.[3] However, the ESA expressly contemplates the existence of state wildlife management laws, and preempts state laws only to the extent that they effectively (1) permit what is prohibited by the ESA and its implementing regulations, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in the ESA or its implementing regulations.[4] The protection of the wildlife of the state is peculiarly within the police power,[5] and the state has great latitude in determining what means are appropriate for its protection.[6]

The preemption section of the Endangered Species Act (ESA), which states that the ESA shall not be construed to void any state law intended to conserve wildlife,[7] did not carve out an exception to the ESA that would allow a state statute, which

banned the use of any steel-jawed leghold animal trap by any person, to avoid preemption, since the effect of such conservation would be to further endanger species already listed as endangered under the ESA.[8] On the other hand, a state statute banning the importation or sale within the state of products made from kangaroo was not preempted by the Federal Endangered Species Act under either express preemption or conflict preemption; the Federal Act did not expressly preempt the state statute, and simultaneous compliance with both the federal law and the state law was not a physical impossibility.[9]

Footnotes

1 Construction and Application of State Endangered Species Acts, 44 A.L.R.6th 325.

2 16 U.S.C.A. § 1535(f).

3 U.S. v. Glenn-Colusa Irr. Dist., 788 F. Supp. 1126 (E.D. Cal. 1992).

4 Art & Antique Dealers League of America, Inc. v. Seggos, 394 F. Supp. 3d 447 (S.D. N.Y. 2019).

5 Cason v. State Dept. of Wildlife and Fisheries, 16 So. 3d 598 (La. Ct. App. 2d Cir. 2009), writ denied, 21 So. 3d 312 (La. 2009) (a state's police powers includes safeguarding the wildlife and fisheries for the benefit of its people); Gray v. North Dakota Game and Fish Dept., 2005 ND 204, 706 N.W.2d 614 (N.D. 2005).

6 Gray v. North Dakota Game and Fish Dept., 2005 ND 204, 706 N.W.2d 614 (N.D. 2005).

7 16 U.S.C.A. § 1535(f).

8 National Audubon Society, Inc. v. Davis, 307 F.3d 835 (9th Cir. 2002), opinion amended on other grounds on denial of reh'g, 312 F.3d 416 (9th Cir. 2002).

9 Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., 41 Cal. 4th 929, 63 Cal. Rptr. 3d 50, 162 P.3d 569 (2007).

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B. Endangered Species Act

§ 62. Determination and listing of endangered or threatened species under Endangered Species Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 527 to 530

West's Key Number Digest, Fish 8, 9, 12
West's Key Number Digest, Game 3.5, 4

A.L.R. Library

Construction and Application of Threatened Species Requirements under Sec. 4(a) and (b) of the Endangered Species Act of 1973, 16 U.S.C.A. s1533(a) and (b), 6 A.L.R. Fed. 3d Art. 2

Designation of "Critical Habitat" Under Endangered Species Act, 176 A.L.R. Fed. 405

The Endangered Species Act (ESA) directs that the Secretary of Commerce or the Secretary of the Interior determine by regulation whether any species is endangered or threatened because of (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or education purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.[1] The ESA defines an "endangered species" as any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the class Insecta determined by the Secretary to constitute a pest whose protection under the Act would present an overwhelming and overriding risk to humanity.[2] A "threatened species" is any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.[3]

Observation:

Whether a species is threatened with extinction in a significant portion of its range and whether a distinct population segment of a species is threatened with extinction are independent legal questions under the ESA.[4]

The Secretary, by regulation promulgated in accordance with the ESA and to the maximum extent prudent and determinable, must, concurrently with making a determination that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat, and may, from time to time thereafter as appropriate, revise such designation.[5]

Definitions:

The term "critical habitat" for a threatened or endangered species means:[6]

(1) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and

(2) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species.

A species "occupies" an area, for the purpose of designating a particular area as critical habitat under the ESA, if it uses the area with sufficient regularity that it is likely to be present during any reasonable span of time.[7]

If the Fish and Wildlife Service determines that a critical habitat is "not prudent," a critical habitat determination for a species listed as endangered under the ESA is not required.[8] There is no right in the ESA to public notice of the area that could be designated as critical habitat.[9]

The Secretary will make the determination, as required by the ESA,[10] whether a species is endangered or threatened species, solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species and after taking into account any efforts being made by any state (or subdivision thereof) or a foreign nation (or subdivision thereof) to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, on the high seas.[11] Thus, the agency cannot base its decision on budgetary considerations.[12] In the absence of available evidence, the ESA does not require an agency to conduct its own studies in determining whether to list species as endangered or threatened.[13] The ESA's best available data requirement merely prohibits an agency from disregarding available scientific evidence that is in some way better than the evidence it relies on.[14] Consideration must also be given to species which have been designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement, or which have been identified as in danger of extinction, or likely to become in danger of extinction by any agency of a state or a foreign nation responsible for the conservation of fish, wildlife, or plants.[15]

The Secretary of the Interior must publish in the Federal Register a list of all species determined by him or her or the Secretary of Commerce to be endangered species and a list of all species determined by him or her or the Secretary of Commerce to be threatened species. The Secretary must from time to time revise each list published to reflect recent determinations, designations, and revisions made.[16] Citizens may petition the Secretary to have a species added to, or deleted from, the lists of endangered or threatened species required to be published by the Act.[17]

The Secretary of the Interior's duty to respond to emergency listing requests under the ESA is discretionary, and thus review of the Secretary's decision is governed by the Administrative Procedure Act, rather than the ESA.[18]

Observation:

Pursuant to its authority under the Commerce Clause to regulate activities that substantially affect interstate commerce, the United

States Fish and Wildlife Service could list purely intrastate species of fish with little commercial value, like the Alabama sturgeon, as endangered species, since the comprehensive scheme of the Endangered Species Act had a substantial effect on interstate commerce, and Congress had a rational basis for including intrastate species within the scope of that larger regulatory scheme.[19]

Consistent with the foregoing provisions and principles of law, the courts have held that—

— the United States Fish and Wildlife Service properly classified Alabama sturgeon as separate from shovelnose sturgeon, and thus an endangered species, on the basis of the best scientific and commercial data available, including DNA results and the taxonomic record; while the cytochrome b genes of Alabama sturgeon and shovelnose sturgeon were nearly identical, this fact was consistent with the theory that the two species began to diverge only 10,000 years ago.[20]

— the listing of Gulf of Maine distinct population segment (DPS) of Atlantic salmon as endangered was supported by the best scientific evidence and was not an abuse of discretion, arbitrary, capricious, or contrary to law, although an earlier plan to list DPS had been withdrawn; the National Marine Fisheries Service and Fish and Wildlife Service found that the DPS was subject to habitat threats, overutilization, disease and predation, and that existing regulatory mechanisms did not decrease or remove the threat to the species.[21]

— a petition presented substantial scientific and commercial information indicating that the listing of Yellowstone cutthroat trout as a threatened species could be warranted, and thus the Fish and Wildlife Service's conclusion to the contrary was arbitrary and capricious; the petition and its attached exhibits credibly indicated that because of the loss of its habitat, the species' continued existence was threatened, and the petition was corroborated by comments submitted by the Forest Service indicating that a majority of the remaining populations of the species were at risk, and that 196 populations were already extinct.[22]

— the National Marine Fisheries Service (NMFS) acted arbitrarily and capriciously when it decided to list only naturally spawning coho salmon as "threatened" under the ESA and exclude hatchery spawned coho salmon from listing protection, even if determined to be part of the same distinct population segment as natural coho salmon populations, because they were not considered to be essential for recovery, inasmuch as the NMFS relied on factors upon which Congress did not intend for it to rely when it made a listing decision based on distinctions below that of subspecies or a distinct population segment of a species.[23]

— the decision of the Fish and Wildlife Service (FWS) to deny a petition to classify western gray squirrels in Washington state as an endangered "distinct population segment" under the ESA was not arbitrary or capricious, since in reaching its ultimate finding, the FWS, which found that squirrels in Washington constituted a discrete population, but were not significant to the taxon, considered the relevant factors and articulated a rational connection between the facts found and the choices made.[24]

— under the ESA, the offspring of two protected subspecies of tiger, such as a Bengal tiger and a Siberian tiger, are protected.[25]

Footnotes

1 16 U.S.C.A. § 1533(a)(1).

2 16 U.S.C.A. § 1532(6).

3 16 U.S.C.A. § 1532(20).
The term "range," as used in the ESA was ambiguous as to whether it meant current or historical range, and thus, under *Chevron*, a federal court would evaluate whether Fish and Wildlife Service's policy for determining the Significant Portion Range for an endangered or threatened species under the ESA, which defined range as general geographical area within which the species could be found at the time the Service makes any particular status determination, was based on a permissible construction of the ESA. Center for Biological Diversity v. Zinke, 900 F.3d 1053 (9th Cir. 2018).
The Fish and Wildlife Service's interpretation of term "range" to mean the current range of a species, as used in the ESA provision requiring a species to be listed as endangered or threatened if threatened throughout all or a significant portion of its range, was reasonable, where the ESA used the present-tense form of "range," focusing on a species'

survival in the range it currently occupied, was consonant with the purpose of the ESA to reverse the trend toward species extinction. Humane Society of United States v. Zinke, 865 F.3d 585 (D.C. Cir. 2017).

[4] Tucson Herpetological Soc. v. Salazar, 566 F.3d 870 (9th Cir. 2009).

[5] 16 U.S.C.A. § 1533(a)(3)(A).

[6] 16 U.S.C.A. § 1532(5)(A).

[7] New Mexico Farm and Livestock Bureau v. United States Department of Interior, 952 F.3d 1216 (10th Cir. 2020).
Determining whether a species uses an area with sufficient regularity that it is "occupied" within the meaning of the ESA's critical habitat provision is a highly contextual and fact-dependent inquiry, and relevant factors include how often the area is used, how the species uses the area, the necessity of the area for the species' conservation, and species characteristics such as degree of mobility or migration. Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160 (9th Cir. 2010).

[8] Missouri ex rel. Nixon v. Secretary of the Interior, 158 F. Supp. 2d 984 (W.D. Mo. 2001).
A construction company that held property that supported endangered and threatened plant species suffered particularized injury as a result of the Fish and Wildlife Service's determination that the designation of critical habitat for species was not prudent, and thus the organization representing the company had standing to bring a suit under the ESA seeking reconsideration of the critical habitat designation. Building Industry Legal Defense Foundation v. Norton, 259 F. Supp. 2d 1081 (S.D. Cal. 2003).

[9] Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007).

[10] 16 U.S.C.A. § 1533(a)(1).

[11] 16 U.S.C.A. § 1533(b)(1)(A).

[12] Center for Biological Diversity v. Everson, 435 F. Supp. 3d 69 (D.D.C. 2020), appeal dismissed, 2020 WL 5822535 (D.C. Cir. 2020) and appeal dismissed, 2020 WL 4106889 (D.C. Cir. 2020).

[13] American Wildlands v. Kempthorne, 530 F.3d 991 (D.C. Cir. 2008).

[14] Kern County Farm Bureau v. Allen, 450 F.3d 1072 (9th Cir. 2006); American Wildlands v. Kempthorne, 530 F.3d 991 (D.C. Cir. 2008).
The Fish and Wildlife Service (FWS) did not rely on the best scientific and commercial data available to support its finding that the fluvial arctic grayling population was increasing, and thus its determination not to list the arctic grayling as either threatened or endangered under the ESA, on that basis, was arbitrary and capricious; the FWS failed to account for a report of four scientists which found that the numbers of effective breeders was declining, the FWS clearly stated in its finding that the number of arctic grayling increased and omitted the study's evidence to the contrary, and the FWS did not provide a reason to ignore the study in favor of the study that the FWS relied on. Center for Biological Diversity v. Zinke, 900 F.3d 1053 (9th Cir. 2018).

[15] 16 U.S.C.A. § 1533(b)(1)(B).

[16] 16 U.S.C.A. § 1533(c)(1).

[17] 16 U.S.C.A. § 1533(b)(3).
The National Marine Fisheries Service's rejection of a petition that coho salmon south of San Francisco should not be designated as endangered under the ESA was arbitrary and capricious. The Service bypassed the required initial 90-day review of the petition and proceeded to do what was, in essence, a 12-month status review. Thus, the evidentiary standard they applied was not whether the petitioned action may be warranted, as required under the 90-day review, but whether the action was warranted. Further, the Service improperly relied on evidence beyond the four corners of the petition in making its decision. McCrary v. Gutierrez, 71 Env't. Rep. Cas. (BNA) 1860, 2010 WL 520762 (N.D. Cal. 2010).

[18] Institute For Wildlife Protection v. Norton, 303 F. Supp. 2d 1175 (W.D. Wash. 2003), aff'd, 149 Fed. Appx. 627 (9th Cir. 2005).

[19] Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007).

[20] Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007).

[21] Maine v. Norton, 257 F. Supp. 2d 357 (D. Me. 2003).

[22] Center For Biological Diversity v. Morgenweck, 351 F. Supp. 2d 1137 (D. Colo. 2004).

[23] Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or. 2001).

[24] Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service, 475 F.3d 1136 (9th Cir. 2007).

[25] U.S. v. Kapp, 419 F.3d 666 (7th Cir. 2005).

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IV. Federal Wildlife Conservation and Protection Acts

B. Endangered Species Act

§ 63. Recovery plans for conservation and survival of endangered or threatened species under Endangered Species Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 527 to 530, 536

West's Key Number Digest, Fish 8, 9, 12
West's Key Number Digest, Game 3.5, 4

A.L.R. Library

Construction and Application of the Consultation Requirement Under Section 7 of the Endangered Species Act, 16 U.S.C.A. s1536(a) to (d), 1 A.L.R. Fed. 3d Art. 4

Once a species has been listed under the Endangered Species Act as endangered or threatened,[1] the Secretary making that determination must develop and implement recovery plans for the conservation and survival of such species, unless he or she finds that such a plan will not promote the conservation of the species.[2] In developing and implementing recovery plans, the Secretary is required, to the maximum extent possible, to give priority to those endangered or threatened species most likely to benefit from such a plan, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity.[3] All other federal agencies must, in consultation with the Secretary, utilize their authorities in furtherance of the purposes of the Endangered Species Act by carrying out the programs developed by the Secretary for the conservation of endangered or threatened species.[4] While agencies may have discretion in selecting a particular program to conserve under the ESA requirement that federal agencies execute their programs in a manner consistent with conservation of endangered species,[5] they must in fact carry out a program to conserve, and not an "insignificant" measure that does not, or is not reasonably likely to, conserve endangered or threatened species.[6] Thus, an environmental rights group states a claim under the ESA by alleging that the government has been statutorily required to develop and implement a legally valid recovery plan for a particular species but has continually failed to do so.[7]

Observation:

Under the ESA, recovery plans serve as guidance for recovery, but do not create legally enforceable duties.[8] A recovery plan promulgated by the Fish and Wildlife Service for a species of fish listed as "threatened" under the ESA is not final agency action, as required for judicial review of the plan under the Administrative Procedure Act (APA), and thus environmental advocacy groups cannot maintain APA claims against the Service arising from various alleged deficiencies in the recovery plan.[9]

Footnotes

1 § 62.

2 16 U.S.C.A. § 1533(f)(1).

3 16 U.S.C.A. § 1533(f)(1)(A).

4 16 U.S.C.A. § 1536(a)(1).

5 16 U.S.C.A. § 1536(a)(1).

6 Florida Key Deer v. Paulison, 522 F.3d 1133 (11th Cir. 2008).

7 Center for Biological Diversity v. Bernhardt, 2020 WL 4903844 (D.D.C. 2020).

8 WildEarth Guardians v. United States Fish and Wildlife Service, 416 F. Supp. 3d 909 (D. Ariz. 2019).

9 Friends of the Wild Swan, Inc. v. Director of United States Fish & Wildlife Service, 745 Fed. Appx. 718 (9th Cir. 2018) (the groups conceded that the plan was not legally binding, and the plan did not create any legal rights or obligations for the Service or any third parties).

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IV. Federal Wildlife Conservation and Protection Acts

B. Endangered Species Act

§ 64. Restrictions on federal agency action under Endangered Species Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 524, 528 to 530, 536, 537

Under the Endangered Species Act (ESA), once a species has been listed as endangered or threatened,[1] each federal agency must, in consultation with and with the assistance of the Secretary making that determination, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of such species, or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected states, to be critical, unless the agency has been granted an exemption as provided in the Act.[2] Under this provision, formal consultation with the appropriate wildlife agency is a mandatory process for proposed projects that may adversely affect a listed species or a critical habitat.[3] In fulfilling the foregoing requirements each agency must use the best scientific and commercial data available.[4]

Observation:

The requirement that federal agencies insure that their actions are not likely to jeopardize endangered or threatened species, or their critical habitats, resulted in perhaps the most celebrated decision in the history of environmental law, in which the U.S. Supreme Court approved the granting of an injunction against the operation of a dam constructed by the Tennessee Valley Authority which would have destroyed the habitat of a small fish known as the snail darter, which had been designated by the Secretary of the Interior as an endangered species.[5] Although acknowledging that the dam's construction was virtually complete and that enjoining its operation would mean the sacrifice of the anticipated benefits of the dam and millions of dollars of public funds which had already been expended for its construction, the court rejected the contention that its duty was to balance the equities of the case, stating "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities."[6] After the court's decision, Congress amended the ESA to add provisions for obtaining exemptions from the "no jeopardy" rule.[7]

The Army Corps of Engineers did not act arbitrarily or capriciously, and thus did not violate the ESA, by relying on limited modeling information when making changes to a water control plan for the purpose of protecting the habitat of endangered bird species, since the Corps used the best scientific information available, given that it determined that it could not defer a decision until more detailed information was available, because deferral could have negative impacts on the endangered bird's critical habitat, and it adopted safeguards in the event of unforeseen adverse impacts.[8] Similarly, the Army Corps of Engineers did not violate the ESA when it relied on the biological opinions of the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) that a proposed state highway project was not likely to adversely affect endangered and threatened species when it issued a permit to discharge project materials to a state department of transportation, because, while it was possible to disagree with the opinions regarding the project's impact on the listed species of the relative benefits of its mitigation program and causeway removal, such opinions and the Corps' reliance on them were not arbitrary or capricious.[9] Likewise, the Fish and Wildlife Service considered the relevant factors and articulated a rational connection between the facts and its decision to make a no jeopardy determination, in determining that recent reductions in cattle numbers and seasons of use, combined with the removal of cattle from riparian areas, would prevent authorization or reauthorization of livestock grazing on 16 allotments of land in a national forest from jeopardizing the continued existence of endangered spikedace and loach minnow.[10]

Footnotes

1 § 62.

2 16 U.S.C.A. § 1536(a)(2).
Whereas the National Environmental Policy Act asks the agency to identify and prepare an environmental impact report for "significant" impacts on any aspect of the environment, the ESA requirements are triggered by a lower threshold, but for a narrower set of impacts: the agency must identify any potential effect, however small, on listed species and consult with the relevant agencies about the proposed action. Institute for Fisheries Resources v. United States Food and Drug Administration, 2020 WL 6495656 (N.D. Cal. 2020).

3 Sierra Club v. United States Army Corps of Engineers, 2020 WL 5096947 (W.D. Tex. 2020).

4 16 U.S.C.A. § 1536(a)(2).
What constitutes the best scientific and commercial data available, as required for the ESA's "best available science" standard for an administrative agency's formulation of a biological opinion, is itself a scientific determination deserving of deference; for that reason a court should be especially wary of overturning such a determination on review under the arbitrary and capricious standard of the Administrative Procedure Act. San Luis & Delta-Mendota Water Authority v. Locke, 776 F.3d 971 (9th Cir. 2014).

5 Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

6 Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

7 16 U.S.C.A. § 1536(e) to (h).

8 Miccosukee Tribe of Indians of FL v. U.S., 420 F. Supp. 2d 1324 (S.D. Fla. 2006).

9 Florida Keys Citizens Coalition, Inc. v. U.S. Army Corps of Engineers, 374 F. Supp. 2d 1116 (S.D. Fla. 2005).

10 Forest Guardians v. Veneman, 392 F. Supp. 2d 1082 (D. Ariz. 2005).

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IV. Federal Wildlife Conservation and Protection Acts

B. Endangered Species Act

§ 65. Prohibited acts under Endangered Species Act; permits

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 527 to 531

A.L.R. Library

Construction and Application of Prohibited Acts Under Sec. 9(a) of the Endangered Species Act of 1973, 16 U.S.C.A. s1538(a), 9 A.L.R. Fed. 3d Art. 3

Construction and Application of Exceptions Under s10 of the Endangered Species Act of 1973, 16 U.S.C.A. s1539, 2 A.L.R. Fed. 3d Art. 2

Construction and Application of the Consultation Requirement Under Section 7 of the Endangered Species Act, 16 U.S.C.A. s1536(a) to (d), 1 A.L.R. Fed. 3d Art. 4

Trial Strategy

Proof of "Prohibited Takings" Under the Endangered Species Act, 27 Am. Jur. Proof of Facts 3d 421

Except as provided in specific exceptions, the Endangered Species Act (ESA) prohibits various acts with respect to endangered species of fish or wildlife listed pursuant to the Act.[1] Persons subject to the jurisdiction of the United States may not, inter alia, import, export, sell, offer for sale, or take any such endangered species.[2] In the context of the ESA's prohibition against the taking of an endangered species, the term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.[3] "Take," in this context, is defined in the broadest possible manner to include every conceivable way in which a person can take or attempt to take any fish or wildlife.[4] The

Secretary of the Interior has by regulation defined "harm," as used in the definition of "take," as including significant habitat modification or degradation that actually kills or injures wildlife, and this definition has been upheld as reasonable.[5] For there to be harm under the ESA, there must be actual injury to the listed species.[6] The regulatory definition of "harm" as including significant habitat modification or degradation is on its face limited to such modification and degradation that actually kills or injures wildlife. Although this language precludes a citizen suit based on nothing more than a mere allegation of habitat modification or degradation, it does not require a citizen plaintiff suing under the ESA to wait until there has actually been an injury to wildlife due to such modification or degradation; the letter and spirit of the Act permit maintenance of an action to enjoin habitation modification or degradation which would result in an imminent (as opposed to merely potential) threat of death or injury to wildlife.[7] Moreover, the definition of "harm" as including significant habitat modification or degradation which actually kills or injures wildlife is not void for vagueness.[8]

Observation:

The federal government's application of the provision of the ESA prohibiting the "taking" of endangered and threatened species without a permit to preclude the proposed development of a shopping center, a residential subdivision, and office buildings on a property containing six regulated species did not undermine the traditional state authority to regulate wildlife and land use, even if the regulated species were found exclusively within the state, in light of the federal government's well established exercise of its authority in the regulation of local land for wildlife conservation.[9]

With respect to plants, the ESA prohibits, inter alia, the import or export of endangered plant species into or from the United States,[10] and also the removal or destruction of such species in areas under federal jurisdiction, or in any other area if done in knowing violation of state law.[11]

Although the prohibitions of the ESA are for the most part stated with respect to acts that affect endangered species, the Act also prohibits the violation of any regulation pertaining to endangered species or to threatened species.[12]

Practice Tip:

Persons who may be held liable for violating the prohibitions of the Act include an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the federal government, of any state, municipality, or political subdivision of a state, or of any foreign government; any state, municipality, or political subdivision of a state; or any other entity subject to the jurisdiction of the United States.[13]

The Secretary of Commerce or the Secretary of the Interior may, upon the satisfaction of conditions specified in the ESA, issue a permit to allow certain acts which would otherwise be prohibited.[14]

Footnotes

1 As to what is an endangered species, see § 62.

2 16 U.S.C.A. § 1538(a)(1).

[3] 16 U.S.C.A. § 1532(19).

[4] Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997).
The Fish & Wildlife Service (FWS) acted as a consulting agency, rather than an action agency, in issuing biological opinion stating that a water control project would not result in injury to an endangered bird species, and therefore the FWS was not liable, under the ESA provision prohibiting incidental "taking" of endangered species, in an Indian tribe's action alleging that the FWS authorized incidental "taking" of bird habitat without considering the best available scientific information. Miccosukee Tribe of Indians of Fla. v. U.S., 430 F. Supp. 2d 1328 (S.D. Fla. 2006).

[5] Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995).

[6] Man Against Xtinction v. Commissioner of Maine Department of Marine Resources, 2020 WL 4588530 (D. Me. 2020).

[7] Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir. 1995).
As to citizen suits under the Act, generally, see §§ 68 to 70.

[8] Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), opinion modified on reh'g on other grounds, 17 F.3d 1463 (D.C. Cir. 1994), judgment rev'd on other grounds, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995).

[9] GDF Realty Investments, Ltd. v. Norton, 169 F. Supp. 2d 648 (W.D. Tex. 2001), judgment aff'd, 326 F.3d 622 (5th Cir. 2003).

[10] 16 U.S.C.A. § 1538(a)(2)(A).

[11] 16 U.S.C.A. § 1538(a)(2)(B).
Privately owned wetlands from which defendants removed endangered plant species were not "areas under Federal jurisdiction" for purpose of the ESA provision making it unlawful to remove and reduce to possession any endangered plant species from land under federal jurisdiction. Northern California River Watch v. Wilcox, 633 F.3d 766 (9th Cir. 2011).

[12] 16 U.S.C.A. §§ 1538(a)(1)(G), 1538(a)(2)(E).

[13] 16 U.S.C.A. § 1532(13).

[14] 16 U.S.C.A. § 1539(a).
The U.S. Fish and Wildlife Service's refusal to increase a state's incidental take estimate to account for the state's animal damage control and predator management trapping programs in issuing an incidental take permit under the ESA to the state, which exempted the state from incidental takes of Canada lynx resulting from its state-regulated trapping programs, was neither arbitrary or capricious under the Administrative Procedure Act, where the Service found that the animal damage control program was aimed primarily at trapping beaver and that no lynx had ever been reported caught by animal damage control trappers. Friends of Animals v. Phifer, 238 F. Supp. 3d 119 (D. Me. 2017).

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§ 66. Civil and criminal penalties under Endangered Species Act; forfeitures

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 529, 546, 749

West's Key Number Digest, Fish 14
West's Key Number Digest, Game 8, 9

A.L.R. Library

Construction and Application of Civil Penalties Under s11 of the Endangered Species Act of 1973, 16 U.S.C.A. s1540, Excluding Injunctive Relief or Forfeitures, 87 A.L.R. Fed. 2d 455

Criminal prosecution under Endangered Species Act of 1973 (16 U.S.C.A. secs. 1531-1543 et seq.), 128 A.L.R. Fed. 271

Trial Strategy

Proof of Standing in Environmental Citizen Suits, 157 Am. Jur. Proof of Facts 3d 1

Proof of "Prohibited Takings" Under the Endangered Species Act, 27 Am. Jur. Proof of Facts 3d 421

The Endangered Species Act (ESA) provides for civil[1] and criminal[2] penalties for violations of its prohibitions.[3] The ESA also provides for the forfeiture of animals and plants taken in violation of its provisions,[4] and for forfeiture, upon conviction of a criminal violation of the Act, of specified types of property used in connection with the violation.[5]

To establish a criminal violation of the ESA by a taking of an endangered or threatened species, it is not necessary to show that the violator knew that the species he or she took was endangered or threatened; criminal violations of the Act are crimes

of general rather than specific intent.[6] The subjective standard applicable to a defendant's claim of self-defense in a prosecution for unlawful taking of a grizzly bear in violation of the ESA is satisfied when a defendant actually, even if unreasonably, believes that his or her actions are necessary to protect the defendant or others from perceived danger from a grizzly bear.[7] However, the reasonableness of a belief that an endangered animal posed a threat is strong evidence of whether the defendant actually held that belief in good faith, as required in order to escape criminal liability on the basis of self-defense.[8]

Footnotes

1 16 U.S.C.A. § 1540(a).
The United States Fish and Wildlife Service's decision to impose a $15,000 fine on a commercial importer of reptiles was reasonable, sufficiently explained, and permissible under applicable law, and thus the decision survived judicial review under the Administrative Procedure Act; the Service fined the importer under the ESA after importer violated the ESA by failing to present a valid export permit when importing a shipment of reptiles subject to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, with the permit having been invalid for want of the exporter's signature. Global Tropical Imports and Exports LLC v. Bernhardt, 366 F. Supp. 3d 110 (D.D.C. 2019), stay pending appeal denied, 2019 WL 2775577 (D.D.C. 2019) and aff'd, 798 Fed. Appx. 659 (D.C. Cir. 2020).

2 16 U.S.C.A. § 1540(b).

3 As to the prohibited acts, see § 65.

4 16 U.S.C.A. § 1540(e)(4)(A).
The seizure and forfeiture of illegally imported sport-hunted trophies of endangered species by Fish and Wildlife Service (FWS) officials pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the ESA did not violate the hunters' procedural due process rights, where the FWS provided notice to hunters and an opportunity to be heard before the trophies were forfeited. Conservation Force v. Salazar, 677 F. Supp. 2d 1203 (N.D. Cal. 2009), aff'd, 646 F.3d 1240 (9th Cir. 2011).

5 16 U.S.C.A. § 1540(e)(4)(B).

6 U.S. v. Nguyen, 916 F.2d 1016 (5th Cir. 1990); U.S. v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987).

7 United States v. Charette, 893 F.3d 1169 (9th Cir. 2018).

8 United States v. Wallen, 874 F.3d 620 (9th Cir. 2017).

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B. Endangered Species Act

§ 67. Judicial review of final agency action under Endangered Species Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 647

There exists no statutory review provision in the Endangered Species Act (ESA) that authorizes judicial review of agency action beyond that provided for in the Administrative Procedure Act (APA), and thus, an agency action must be final in order to be judicially reviewable.[1] The Fish and Wildlife Service's biological opinion and its accompanying incidental take statement under the ESA represent final agency action subject to judicial review under the Administrative Procedure Act's arbitrary and capricious standard.[2] Also, a claim brought under the ESA by environmental organizations against the Coast Guard, challenging the agency's processes regarding vessel routing that coincided with the habitat of the endangered right whale, was based upon "final agency action" for purposes of judicial review under the Administrative Procedure Act, since although an international organization allegedly recommended changes to the traffic separation schemes, the Coast Guard was ultimately charged with promulgating such schemes.[3]

At the summary judgment stage, when seeking judicial review under the ESA, a plaintiff may not merely allege its standing to sue, but must support its claims with affidavits or other evidence of specific facts.[4]

Footnotes

1 National Ass'n of Home Builders v. Norton, 415 F.3d 8 (D.C. Cir. 2005).

2 Oregon Natural Resources Council v. Allen, 476 F.3d 1031 (9th Cir. 2007); Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management, 273 F.3d 1229 (9th Cir. 2001); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003).
Judicial review under the Administrative Procedure Act, see Am. Jur. 2d, Administrative Law §§ 383 to 559.

3 Defenders of Wildlife v. Gutierrez, 532 F.3d 913 (D.C. Cir. 2008).

4 Hawai"i Orchid Growers Ass'n v. U.S. Dept. of Agr., 436 F. Supp. 2d 45 (D.D.C. 2006), order aff'd, 249 Fed. Appx.

204 (D.C. Cir. 2007).

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B. Endangered Species Act

§ 68. Citizen suits under Endangered Species Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 650 to 652, 659

A.L.R. Library

Standard of Review Under the Endangered Species Act of 1973, 16 U.S.C.A. secs. 1531 to 1544, 93 A.L.R. Fed. 2d 121

Trial Strategy

Citizen-Suit Claims Under § 11(g)(1) of the Endangered Species Act, 89 Am. Jur. Proof of Facts 3d 125

Proof of "Prohibited Takings" Under the Endangered Species Act, 27 Am. Jur. Proof of Facts 3d 421

Forms

Am. Jur. Pleading and Practice Forms, Fish and Game § 43 (Complaint in federal court—To enjoin implementation of federal regulation permitting sport hunting season on endangered species)
Am. Jur. Pleading and Practice Forms, Fish and Game § 44 (Complaint in federal court—For declaratory and injunctive relief—To reverse determination of United States Fish and Wildlife Service in violation of Endangered Species Act)
Am. Jur. Pleading and Practice Forms, Highways, Streets, and Bridges § 219 (Complaint in federal court—Against federal and state officials—For injunctive and declaratory relief—Federal highway project encroaching on habitat of endangered species—Violations of Federal-Aid Highway and Endangered Species Acts)

Am. Jur. Pleading and Practice Forms, Pollution Control § 168 (Complaint in federal court—Against EPA—For declaratory and injunctive relief—Failure of EPA to prevent jeopardy to endangered species caused by EPA's continued registration of pesticide atrazine—Citizen suit under Endangered Species Act)
Federal Procedural Forms § 50:239 (Complaint in district court—To enjoin implementation of federal regulation permitting sport hunting season on endangered species)

The Endangered Species Act (ESA) provides for the bringing of a civil action by "any person," on his or her own behalf, to (1) enjoin any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment) alleged to be in violation of the Act; (2) compel the Secretary of Commerce or the Secretary of the Interior to apply the prohibitions set forth in the Act against the taking of a resident endangered or threatened species within any state; or (3) against the Secretary of Commerce or the Secretary of the Interior where there is alleged a failure of the Secretary to perform any act relating to the determination of endangered or threatened species which is not discretionary with the Secretary.[1] This citizen-suit provision of the ESA expands standing to the full extent permitted under Article III of the United States Constitution and eliminates any prudential standing requirements.[2] Thus, the "zone-of-interests" test that is generally applied by federal courts, in actions brought under a specific statutory or constitutional provision, to determine whether the plaintiff has standing to sue, does not apply in citizen suits under the ESA.[3] Nevertheless, to establish standing, a plaintiff bringing an action under the citizen-suit provision of the ESA must show (1) an injury in fact that is concrete and particularized and actual or imminent, (2) that the injury is fairly traceable to the defendant's challenged conduct, and (3) that the injury is likely to be redressed by a favorable decision.[4] Thus, the ESA's citizen-suit provision does not bestow standing on plaintiffs who claim no particularized injury, but only a generalized interest shared by all citizens in the proper administration of the law.[5] However, environmental plaintiffs adequately allege injury in fact, for purposes of standing under the ESA, if they desire to use or observe an animal species, even for purely esthetic purposes.[6]

An injury in fact, for purposes of standing, can be found when a defendant adversely affects a plaintiff's enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant's actions.[7] More specifically, an emotional attachment to a particular animal could form the predicate of a claim of injury under the citizen-suit provision of the Endangered Species Act.[8] Thus, a former elephant handler demonstrated present or imminent injury, as required for standing to sue a circus under the citizen-suit provision of the Act, where he alleged that he became strongly attached to the elephants when he worked with them and would like to visit them again.[9]

Standing under the ESA has also been recognized in relation to—
— Mexican and American environmental organizations which brought an ESA action against the Department of the Interior arising from reductions in river flow and changes in the river's water quality, which were identified as "primary factors" contributing to the declines of species, where the organizations demonstrated that the impacts on species had a direct effect on the aesthetic, scientific, recreational, and economic interests of the organizations' members.[10]
— members of conservation groups who brought an action alleging that the Department of the Interior's decision to reclassify the gray wolf from endangered to threatened status in much of the U.S. violated the ESA, as the members, who had an aesthetic and recreational interest in observing the gray wolf, sufficiently demonstrated an injury in fact, those injuries were fairly traceable to the decision to eliminate protection and recovery efforts in the northeastern area, and the injuries would be redressed by a favorable decision inasmuch as the final rule would have to be reconsidered.[11]
— environmental organizations which sought to enjoin any active sonar test or other operation carried out under the aegis of the Navy's Littoral Warfare Advanced Development (LWAD) program that might adversely affect marine wildlife until the Navy complied with environmental statutes, such standing extending to challenging the LWAD program as a whole, as opposed to individual sea tests, where the cognizable injury which the organizations' members had sustained under the National Environmental Policy Act and the ESA was not based on the direct effects of LWAD's sonar testing activities, but on its failure to properly assess the environmental effects of its sea test program, and the organizations' members provided evidence that they had observed and enjoyed wildlife in many of the specific areas where the LWAD operations had been conducted to date.[12]

On the other hand, the environmental groups' filing of notices of intent to sue under the Endangered Species Act to challenge the Fish and Wildlife Service's and National Marine Fisheries Service's approval of a timber company's fish habitat

conservation plan did not constitute a sufficient threat of litigation to give the timber company standing to bring an action seeking a declaratory judgment as to the validity of the plan, where the notices indicated the groups' intention to sue only these two agencies.[13] Also, a hunting rights group lacked the Article III standing required to intervene as of right, and therefore to oppose settlement agreements reached by the parties, in a suit by environmental groups against the United States Fish and Wildlife Service (FWS), seeking to compel FWS to comply with statutory deadlines when making a determination whether to list various species as endangered or threatened under the ESA, on the basis that the ESA's warranted-but-precluded procedure was allegedly designed to protect its asserted interest in hunting three species during the FWS's delays in listing those species, as Congress's purpose in enacting the ESA's warranted-but-precluded procedure was to facilitate addition of endangered species to the endangered list and not to protect interests in delaying such listing.[14]

Animals protected by the Act do not have standing to bring an action under the citizen-suit provisions of the Act.[15]

Observation:

In an action under the ESA seeking injunctive relief, the balance of hardships and the public interest must tip heavily in favor of the endangered species; a court may not use equity's scales to strike a different balance.[16]

Footnotes

1 16 U.S.C.A. § 1540(g)(1).

2 American Soc. for Prevention of Cruelty to Animals v. Feld Entertainment, Inc., 659 F.3d 13 (D.C. Cir. 2011); People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 189 F. Supp. 3d 1327 (S.D. Fla. 2016), judgment aff'd, 879 F.3d 1142 (11th Cir. 2018), adhered to on denial of reh'g, 905 F.3d 1307 (11th Cir. 2018).
As to standing in federal courts, generally, see Am. Jur. 2d, Federal Courts §§ 576 to 580.

3 Bennett v. Spear, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (stating that the "any person" language of the Act is far broader than the language used by Congress in authorizing citizen suits under other statutes, and that other provisions of the Act relating to citizen suits clearly show the intent of Congress to encourage enforcement of the Act by "private attorneys general").

4 People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 189 F. Supp. 3d 1327 (S.D. Fla. 2016), judgment aff'd, 879 F.3d 1142 (11th Cir. 2018), adhered to on denial of reh'g, 905 F.3d 1307 (11th Cir. 2018).

5 Center for Biological Diversity v. Bernhardt, 442 F. Supp. 3d 97 (D.D.C. 2020).

6 Center for Biological Diversity v. Bernhardt, 2020 WL 4903844 (D.D.C. 2020).

7 American Society For Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003).

8 American Society For Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003).

9 American Society For Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003).

10 Defenders of Wildlife v. Norton, 257 F. Supp. 2d 53 (D.D.C. 2003).

11 National Wildlife Federation v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005).

12 Natural Resources Defense Council Inc. v. U.S. Dept. of Navy, 2002 WL 32095131 (C.D. Cal. 2002).

13 Plum Creek Timber Co., Inc. v. Trout Unlimited, 255 F. Supp. 2d 1159 (D. Idaho 2003).

14 In re Endangered Species Act Section 4 Deadline Litigation-MDL No. 2165, 704 F.3d 972, 84 Fed. R. Serv. 3d 587 (D.C. Cir. 2013).

15 Hawaiian Crow (’Alala) v. Lujan, 906 F. Supp. 549 (D. Haw. 1991).
Cetacean community, consisting of whales, dolphins, and porpoises, lacked standing to sue the government, claiming that the Navy’s proposed deployment of low frequently active sonar (LFAS) violated the Endangered Species Act (ESA). Cetacean Community v. Bush, 249 F. Supp. 2d 1206 (D. Haw. 2003), aff’d, 386 F.3d 1169 (9th Cir. 2004).

16 South Yuba River Citizens League v. National Marine Fisheries Service, 804 F. Supp. 2d 1045 (E.D. Cal. 2011).

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B. Endangered Species Act

§ 69. Citizen suits under Endangered Species Act—Notice requirement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 547

Trial Strategy

Citizen-Suit Claims Under § 11(g)(1) of the Endangered Species Act, 89 Am. Jur. Proof of Facts 3d 125

An action to enjoin any person from violating the Endangered Species Act (ESA) may not be brought prior to 60 days after written notice of the violation has been given to the Secretary and to any alleged violator, and is barred if the Secretary is already taking action to impose a penalty with respect to the matter, or if the United States has commenced and is diligently prosecuting a criminal action to redress the violation.[1] An action to compel the Secretary to apply the prohibitions set forth in the Act against the taking of an endangered or threatened species may not be brought prior to 60 days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to the species, and is barred if the Secretary has commenced and is diligently prosecuting an action under the Act to determine whether such an emergency exists.[2] An action against the Secretary for failure to perform a nondiscretionary act may not be brought prior to 60 days after written notice has been given to the Secretary, except that such an action may be brought immediately after the giving of notice in the case of an emergency posing a significant risk to the well-being of any species of fish, wildlife, or plant.[3] In order to comply with the applicable 60-day notice requirement of the ESA, a citizen plaintiff is not required to list every specific aspect or detail of every alleged violation, nor is the citizen required to describe every ramification of a violation; rather, the analysis turns on the overall sufficiency of the notice.[4]

Caution:

Where applicable, the 60-day notice period for a citizen suit is jurisdictional, and a failure to comply strictly with the notice

requirement is an absolute bar to such an action.[5] A district court may not disregard the ESA's 60-day notice requirement at its discretion.[6]

Footnotes

1 16 U.S.C.A. § 1540(g)(2)(A).
An environmental group's notice of intent to sue the Department of Defense under the Endangered Species Act (ESA) was adequate to apprise the Department of the group's claim that the Navy violated the ESA by failing to conduct a biological assessment in connection with the Naval training exercises conducted on the island of Vieques on an interim basis, pending formal consultation with the Fish and Wildlife Service (FWS) as to the long-term use of the island for such exercises, for purpose of ESA's citizen-suit provisions, where the notice made clear that the group intended to challenge an ongoing delinquency in the preparation of a biological assessment. Water Keeper Alliance v. U.S. Dept. of Defense, 271 F.3d 21 (1st Cir. 2001).

2 16 U.S.C.A. § 1540(g)(2)(B).

3 16 U.S.C.A. § 1540(g)(2)(C).

4 Natural Resources Defense Council v. Zinke, 347 F. Supp. 3d 465 (E.D. Cal. 2018).
Environmental organizations' notice of intent to sue under the ESA did not provide sufficient notice of their claim that two insect and disease treatment programs proposed by United States Forest Service under the Healthy Forest Restoration Act (HFRA) were interrelated or interdependent actions that should have been analyzed together, even though the notice stated that biological assessment for one project failed to adequately address the "cumulative effects" of one project on lynx, lynx habitat, and grizzly bear, where the notice did not refer to the other projects or use the terms "interrelated or independent." Alliance for the Wild Rockies v. Marten, 464 F. Supp. 3d 1169 (D. Mont. 2020).

5 Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515 (9th Cir. 1998); Friends of Animals v. Ashe, 51 F. Supp. 3d 77 (D.D.C. 2014), judgment aff'd, 808 F.3d 900 (D.C. Cir. 2015) ("fastidious" compliance required); Northwest Environmental Defense Center v. United States Army Corps of Eingineers, 2020 WL 4756323 (D. Or. 2020).

6 Natural Resources Defense Council v. Zinke, 347 F. Supp. 3d 465 (E.D. Cal. 2018).

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B. Endangered Species Act

§ 70. Citizen suits under Endangered Species Act—Attorney's fees; costs

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 722

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Attorney's Fees Under s11(g)(4) of Endangered Species Act (16 U.S.C.A. s1540(g)(4)), 171 A.L.R. Fed. 419

The court, in issuing any final order in any suit brought pursuant to the citizen-suit provision of the Endangered Species Act (ESA),[1] may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.[2] In determining an attorney's fee award pursuant to the ESA, there is a strong presumption that the lodestar figure represents a reasonable attorney's fee.[3]

There is authority that the catalyst test is an appropriate basis for awarding attorney's fees in citizen suits brought under the ESA, so that ESA plaintiffs whose suit has a positive catalytic effect are eligible for an attorney's fee award, even if they do not obtain court-ordered relief.[4] Accordingly, the owners of a small, family ranch were required by law to install a head gate and fish screen, such that their doing so was not a gratuitous act, making an award of attorney's fees under the ESA's citizen-suit provision appropriate under the catalyst theory, in an environmental group's action to enjoin the owners from using a fish screen and head gate in their diversion, where the Forest Service was obligated under the law to impose restrictions on its easements that minimized harm to wildlife, and a term of the owners' permanent easement from the Forest Service required that they install the head gate and fish screen before further diverting water from a creek.[5] On the other hand, an organization representing the building industry was not entitled to an award of attorney's fees under the ESA as a result of its role in obtaining a reconsideration of a Fish and Wildlife Service (FWS) determination that the designation of critical habitat for endangered and threatened plant species was not prudent, even though the organization achieved some success on the merits, where an environmental group had filed a parallel suit challenging the FWS's determination, and the organization's arguments were made in substantially the same way by the government, and did not lead the court to a novel or markedly different interpretation or implementation of the ESA than it would have reached in their absence.[6]

A district court did not abuse its discretion in denying an animal rights advocacy group and zoo visitors their attorney's fees and costs incurred in an action against a small, privately owned zoo and its owners under the ESA to enjoin their alleged mistreatment of endangered species, even though they prevailed, where plaintiffs submitted several exhibits and testified about general conditions at the zoo for all animals, not just endangered species, and sought to use. the ESA as a vehicle to close the zoo.[7]

Under the Endangered Species Act, defendants are not entitled to costs and fees unless the plaintiff's litigation was frivolous.[8] Under another statement of the rule, a defendant may recover attorney's fees when the plaintiff's action under the ESA was frivolous, unreasonable, or without foundation, or when the plaintiff continued to litigate after it clearly became so.[9]

Footnotes

1 16 U.S.C.A. § 1540(g)(1).

2 16 U.S.C.A. § 1540(g)(4).

3 McKenzie Flyfishers v. McIntosh, 158 F. Supp. 3d 1085 (D. Or. 2016).
As to the lodestar figure, generally, see Am. Jur. 2d, Costs § 56.

4 Loggerhead Turtle v. County Council of Volusia County, Fla., 307 F.3d 1318 (11th Cir. 2002).

5 Idaho Watersheds Project v. Jones, 253 Fed. Appx. 684 (9th Cir. 2007).

6 Building Industry Legal Defense Foundation v. Norton, 259 F. Supp. 2d 1081 (S.D. Cal. 2003).

7 Kuehl v. Sellner, 887 F.3d 845 (8th Cir. 2018).

8 Ocean Conservancy, Inc. v. National Marine Fisheries Service, 382 F.3d 1159 (9th Cir. 2004).

9 Animal Welfare Institute v. Feld Entertainment, Inc., 944 F. Supp. 2d 1 (D.D.C. 2013).

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C. Protection of Fisheries and Other Marine Resources

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 8, 9, 10(1), 12 to 16
West's Key Number Digest, Game 3.5, 4, 7 to 10
West's Key Number Digest, Indians 366
West's Key Number Digest, States 18.84

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A.L.R. Index, Fish and Game
A.L.R. Index, Magnuson Fishery Conservation and Management Act
A.L.R. Index, Marine Mammal Protection Act
West's A.L.R. Digest, Environmental Law 511 to 551
West's A.L.R. Digest, Fish 8, 9, 10(1), 12 to 16
West's A.L.R. Digest, Game 3.5, 4, 7 to 10
West's A.L.R. Digest, Indians 366
West's A.L.R. Digest, States 18.84

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 71. Atlantic Coastal Fisheries Cooperative Management Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 12

The Atlantic Coastal Fisheries Cooperative Management Act[1] was enacted to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources.[2]

The Atlantic States Marine Fisheries Commission (ASMFC), which was created by a congressionally approved interstate compact of 15 Atlantic coastal states to promote the better utilization of fisheries of the Atlantic seaboard,[3] is not a federal "agency" within the meaning of the Administrative Procedure Act, as the authority exercised by the ASMFC under the compact is not federal in nature, there is no indication that the contracting member states agreed to create a federal agency, and the governing statute plainly allocates coastal fishery management responsibility between the states and the federal government, with each entity playing a separate role.[4]

The Secretary of Commerce did not exceed his authority under the Atlantic Coast Fisheries Cooperative Management Act when he issued lobster trap regulations, where the appropriate councils had adequate opportunities to present their views to the National Marine Fisheries Service and the regulations were compatible with the effective implementation of a coastal fishery management plan.[5]

Footnotes

1 16 U.S.C.A. §§ 5101 to 5108.

2 16 U.S.C.A. § 5101(b).

3 16 U.S.C.A. § 5101(a)(4).

[4] Martha's Vineyard/Dukes County Fishermen's Ass'n v. Locke, 811 F. Supp. 2d 308 (D.D.C. 2011).

[5] Ace Lobster Co., Inc. v. Evans, 165 F. Supp. 2d 148 (D.R.I. 2001).

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 72. Atlantic Tunas Convention Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 12

Among other things, the Atlantic Tunas Convention Act[1] authorizes the Secretary of State, in consultation with the Secretary and the Secretary of the department in which the Coast Guard is operating, to enter into agreements with any contracting party relating to cooperative enforcement of the provisions of the Atlantic Tunas Convention, recommendations in force for the United States and such party or parties under the Convention, and regulations adopted by the United States and such contracting party or parties pursuant to recommendations of the International Commission for the Conservation of Atlantic Tunas.[2] The Act makes it illegal to fish in violation of the regulations implementing the Act; to ship, transport, purchase, sell, offer for sale, import, export, or have in custody, possession, or control any fish which the actor knows, or should have known, were taken or retained contrary to the implementing regulations; to fail to furnish returns, records, or reports; to refuse the request of a person authorized to enforce the Act to board and inspect a vessel; and to import ineligible species or species under investigation.[3] The Secretary[4] is empowered to prevent any person from violating the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the enforcement provisions of the Magnuson-Stevens Fishery Conservation and Management Act were incorporated into and made a part of and applicable to the Atlantic Tunas Convention Act.[5]

Footnotes

1 16 U.S.C.A. §§ 971 to 971k.

2 16 U.S.C.A. § 971c(b).

3 16 U.S.C.A. § 971e.

[4] 16 U.S.C.A. § 971(10); 16 U.S.C.A. § 1802(39).

[5] 16 U.S.C.A. § 1826g(c)(1), referring to 16 U.S.C.A. §§ 1858 to 1861.
Civil procedures for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property, see 15 C.F.R. Pt. 904 (National Oceanic and Atmospheric Administration, Department of Commerce).
As to enforcement of the Magnuson-Stevens Fishery Conservation and Management Act, see § 85.

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35A Am. Jur. 2d Fish, Game, and Wildlife Conservation § 73

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 73. Dolphin Protection Consumer Information Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 12
West's Key Number Digest, States 18.84

Among other things, the Dolphin Protection Consumer Information Act[1] establishes a labeling standard for "dolphin safe" tuna,[2] and makes it an unfair method of competition, in violation of federal law,[3] to violate such standard.[4] A label subject to the Act must meet a number of statutory requirements,[5] as well as complying with all applicable labeling, marketing, and advertising laws and regulations of the Federal Trade Commission, including any guidelines for environmental labeling.[6]

The Secretary of Commerce[7] is empowered to prevent any person from violating the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the enforcement provisions of the Magnuson-Stevens Fishery Conservation and Management Act were incorporated into and made a part of and applicable to the Dolphin Protection Consumer Information Act.[8]

Observation:

Where the Federal Trade Commission has been given authority to police violations of federal advertising regulations, as it has under the Dolphin Protection Consumer Information Act, such enforcement does not preempt similar state law claims.[9]

Footnotes

1 16 U.S.C.A. § 1385.

2 16 U.S.C.A. § 1385(d).

3 15 U.S.C.A. § 45.

4 16 U.S.C.A. § 1385(d)(1).

5 16 U.S.C.A. § 1385(d).

6 16 U.S.C.A. § 1385(d)(3)(C)(iii).

7 16 U.S.C.A. § 1385(c)(4); 16 U.S.C.A. § 1802(39).

8 16 U.S.C.A. § 1826g(c)(1), referring to 16 U.S.C.A. §§ 1858 to 1861.
Civil procedures for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property, see 15 C.F.R. Pt. 904 (National Oceanic and Atmospheric Administration, Department of Commerce).
As to enforcement of the Magnuson-Stevens Fishery Conservation and Management Act, see § 85.

9 Gardner v. Starkist Co., 418 F. Supp. 3d 443 (N.D. Cal. 2019).

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 74. International Dolphin Conservation Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 8, 9, 12 to 16

The International Dolphin Conservation Act[1] authorizes the Secretary of State to enter into international agreements to establish a global moratorium to prohibit the harvesting of tuna through the use of purse seine nets deployed on or to encircle dolphins or other marine mammals.[2] The Act requires such agreements to contain provisions relating to research into methods of tuna fishing which will not harm dolphins or other marine mammals, and relating to limitations on dolphin mortality caused by such research.[3]

The Act also bans the sale or transport of any tuna or tuna product that is not "dolphin safe,"[4] and the intentional setting of a purse seine net on or to encircle any marine mammal during a tuna fishing operation, except as necessary for duly approved scientific research or pursuant to other specified exceptions.[5] Civil and criminal penalties are provided for violation of the Act's prohibitions,[6] and any vessel (including its fishing gear, appurtenances, stores, and cargo) used, and any fish (or its fair-market value) taken or retained, in connection with or as the result of any violation of such provisions is subject to forfeiture.[7]

Footnotes

1 16 U.S.C.A. §§ 1411 to 1417.

2 16 U.S.C.A. § 1412.

3 16 U.S.C.A. § 1413(a).
The Commerce Department's interim-final rule on the taking of allegedly depleted dolphins pursuant to fishing operations by tuna purse seine vessels in the Eastern Tropical Pacific ocean adequately addressed the reduction of

dolphin mortality. Defenders of Wildlife v. Hogarth, 25 Ct. Int'l Trade 1309, 177 F. Supp. 2d 1336 (2001), decision aff'd, 330 F.3d 1358 (Fed. Cir. 2003).

[4] 16 U.S.C.A. § 1417(a)(1).

[5] 16 U.S.C.A. § 1417(a)(2).

[6] 16 U.S.C.A. § 1417(b).

[7] 16 U.S.C.A. § 1417(c).

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1. In General

§ 75. Marine Mammal Protection Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 10(1), 12

A.L.R. Library

Validity, construction, and application of Marine Mammal Protection Act of 1972 (16 U.S.C.A. secs. 1361 et seq.), 124 A.L.R. Fed. 593

Trial Strategy

Proof of Standing in Environmental Citizen Suits, 157 Am. Jur. Proof of Facts 3d 1

Forms

Am. Jur. Pleading and Practice Forms, Fish and Game § 52 (Application—For permit—For taking of morphologically adapted marine mammals incidental to commercial fishing)
Am. Jur. Pleading and Practice Forms, Fish and Game § 53 (Petition in federal court—For declaratory and injunctive relief—Alleged violation of National Environmental Policy Act of 1969—Issuance of permit for taking of marine

mammals—Failure to prepare environmental impact statement)
Federal Procedural Forms § 50:238 (Petition in federal court—For declaratory and injunctive relief—Alleged violation of National Environmental Policy Act of 1969—Issuance of permit for taking of marine mammals—Failure to prepare environmental impact statement)

The Marine Mammal Protection Act[1] was enacted in recognition of the fact that certain species of marine mammals were in danger of extinction or depletion as a result of human activities, and should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part.[2] The Act imposes a moratorium upon the taking and importation of marine mammals and products derived from them, subject to exceptions under permits and regulations issued by the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (as to matters pertaining to animals of the order Cetacea and animals, other than walruses, of the order Pinnipedia), or by the Secretary of the Interior (as to matters pertaining to other marine mammals).[3] The term "take," in the context of this statute, means to harass, hunt, capture, or kill any marine mammals, or to attempt any such conduct.[4] Thus, where substantial evidence supported a finding by the Secretary of Commerce that feeding dolphins in the wild disturbs their normal behavior and may make them less able to search for food on their own, a regulation issued by the Secretary, prohibiting the feeding of wild dolphins as harassment and therefore the "taking" of such dolphins within the meaning of the Marine Mammal Protection Act, was reasonable and within the Secretary's authority.[5]

The Act also contains an exception pertaining to the taking of marine mammals by Indians, Aleuts, and Eskimos residing in Alaska for subsistence purposes or for the purpose of creating and selling authentic native articles of handicrafts and clothing.[6] The Act's exemption for Alaskan natives was intended to protect subsistence hunting and the use of mammal parts for a limited cash economy, as long as neither use is wasteful.[7]

There is also an exception for taking in defense of self or others,[8] a "Good Samaritan" exemption pertaining to the rescue of marine mammals entangled in fishing gear or debris.[9] an exception for incidental takings by United States citizens employed on foreign vessels outside the United States,[10] and exemption of actions necessary for national defense.[11]

Observation:

Balancing the equities between military readiness and conservation must be made explicit in rulemaking by National Marine Fisheries Service under the Marine Mammal Protection Act regarding military readiness activity that affects marine mammals.[12]

The Act authorizes judicial review of the issuance or denial of permits for the taking of marine mammals.[13] Such review can be had by one who has applied for a permit, or one opposed to its issuance.[14] The Act does not authorize citizen suits, and therefore one seeking judicial review of the issuance or denial of a permit must establish his or her standing to seek such review.[15]

The Act imposes civil and criminal penalties for violations of its provisions,[16] and provides for forfeiture of the cargo, or the value thereof, of any vessel or other conveyance employed in the unlawful taking of any marine mammal.[17] However, a fisherman's act of firing two rifle shots into the water behind porpoises, in an attempt to frighten them away and keep them from feeding on bait, and fish he had caught on his lines, was not punishable as a criminal violation of the Marine Mammal Protection Act, inasmuch as such conduct did not involve the kind of direct and serious disruption of the porpoises' behavior required to constitute a criminal "taking" under the Act.[18]

A provision of the Act authorizes the Secretary of the Interior to permit the intentional lethal taking of pinnipeds which are

having a significant negative impact on the decline or recovery of certain salmonid fishery stocks.[19]

Footnotes

1 16 U.S.C.A. §§ 1361 to 1389.

2 16 U.S.C.A. § 1361(1).
The scheme of biomes and provinces identified by the National Marine Fisheries Service (NMFS) in connection with the United States Navy's proposed peacetime use of low-frequency sonar system failed to limit the take of marine mammals to specified geographic region, and thus violated the Marine Mammal Protection Act, where the scheme neither precluded the Navy from applying to proceed in all 54 provinces in a given year nor precluded NMFS from authorizing worldwide deployment of sonar. Natural Resources Defense Council, Inc. v. Evans, 364 F. Supp. 2d 1083 (N.D. Cal. 2003).

3 16 U.S.C.A. § 1371(a), incorporating definition of the term "Secretary" as found in 16 U.S.C.A. § 1362(12)(A).
The issuance of a permit by the National Marine Fisheries Service (NMFS) to a scientist to carry out a proposed oceanographic research project, involving the use of underwater sonar on gray whales off the California coast, did not violate the Marine Mammal Protection Act (MMPA), where the permit application addressed the various requirements of the MMPA, and the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals supported NMFS's decision to issue the permit after reviewing the proposed "takings" of marine mammals for scientific purposes, as required by the MMPA. Australians for Animals v. Evans, 301 F. Supp. 2d 1114 (N.D. Cal. 2004).

4 16 U.S.C.A. § 1362(13).

5 Strong v. U.S., 5 F.3d 905 (5th Cir. 1993).

6 16 U.S.C.A. § 1371(b).

7 U.S. v. Clark, 912 F.2d 1087 (9th Cir. 1990).

8 16 U.S.C.A. § 1371(c).

9 16 U.S.C.A. § 1371(d).

10 16 U.S.C.A. § 1371(e).

11 16 U.S.C.A. § 1371(f).

12 Natural Resources Defense Council, Inc. v. Pritzker, 828 F.3d 1125 (9th Cir. 2016).

13 16 U.S.C.A. § 1374(d)(6).

14 16 U.S.C.A. § 1374(d)(6).

15 Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993) (holding also that animals have no standing to sue under the Act).
The cetacean community, consisting of whales, dolphins, and porpoises, lacked standing to sue government agencies, under the Administrative Procedure Act, for alleged violations of the Marine Mammal Protection Act, and the National Environmental Policy Act, that would allegedly result from the proposed deployment of low-frequency active sonar in periods of heightened threat. Cetacean Community v. Bush, 249 F. Supp. 2d 1206 (D. Haw. 2003), aff'd, 386 F.3d 1169 (9th Cir. 2004).

16 16 U.S.C.A. § 1375.
An assessment of approximately $1.5 million in civil penalties, pursuant to the Marine Mammal Protection Act (MMPA) and the Magnuson-Stevens Fishery Conservation and Management Act, against captains and owners of six commercial fishing vessels for violating the MMPA and a fish aggregation device (FAD) regulation, was not

unconstitutionally excessive, under the Excessive Fines Clause, since the administrative law judge carefully considered the requisite factors including the statutory penalty range, the captains' lack of prior violations, the need to ensure effective deterrence, the harm to protected resources, the economic value of illegally harvested tuna, the timing of new FAD restrictions, and the captains' degree of culpability including that they had committed the violations despite being informed by the agency that knowing purse seine setting on marine mammals was unlawful. Black v. Pritzker, 121 F. Supp. 3d 63 (D.D.C. 2015).

17 16 U.S.C.A. § 1376(a).

18 U.S. v. Hayashi, 22 F.3d 859 (9th Cir. 1993).

19 16 U.S.C.A. § 1389.

The National Marine Fisheries Services did not act arbitrarily or capriciously when it failed to adopt a quantitative measure of significance when authorizing lethal removal of sea lions on ground that they were having a significant negative impact on the decline or recovery of listed salmonid populations. Humane Soc. of the U.S. v. Pritzker, 548 Fed. Appx. 355 (9th Cir. 2013).

An interpretation by the National Marine Fisheries Service (NMFS) of Marine Mammal Protection Act requirement, in authorizing the States of Oregon, Washington, and Idaho to kill up to 85 California sea lions annually at Bonneville Dam in order to protect salmonid populations listed as threatened or endangered under the Endangered Species Act (ESA), that "individually identifiable pinnipeds" were having a significant negative impact on the decline or recovery of listed salmonid populations, was permissible and reasonable under a *Chevron* framework; following the suggestion of the Marine Mammal Commission, NMFS appropriately adopted a two-part interpretation for the requirement, in which it would first determine whether California sea lions collectively were having a significant negative impact on listed salmonids, and would next determine which sea lions were significant contributors to such impact and therefore eligible for lethal removal. Humane Soc. of U.S. v. Locke, 626 F.3d 1040 (9th Cir. 2010).

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 76. Marine Protection, Research, and Sanctuaries Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 8, 9, 12 to 16
West's Key Number Digest, Game 3.5, 4, 7 to 10

The Marine Protection, Research, and Sanctuaries Act[1] is intended to authorize the federal government to properly manage and conserve areas of the marine environment (defined as any area of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction) which are of special national significance due to their resource or human-use values.[2] The Act authorizes the Secretary of Commerce to designate any discrete area of the marine environment as a national marine sanctuary, if the Secretary determines that such designation will further the Act's purposes and policies, and that (1) the area is of special national significance due to its conservation, recreational, ecological, historical, scientific, cultural, archeological, educational, or esthetic qualities; the communities of living marine resources it harbors; or its resource or human-use values; (2) existing state and federal authorities are inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education; (3) designation of the area as a national marine sanctuary will facilitate the objectives of coordinated and comprehensive conservation and management of the area; and (4) the area is of a size and nature that will permit comprehensive and coordinated conservation and management.[3] The Act prohibits certain activities,[4] and criminalizes certain violations.[5] The Act also provides for civil penalties for violations of the Act or regulations issued thereunder.[6]

Under the Act, any person who destroys, causes the loss of, or injures any resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary is liable to the United States for an amount equal to the sum of the response costs and damages resulting from the destruction, loss, or injury plus interest.[7] Any vessel used to destroy, cause the loss of, or injure any sanctuary resource is liable in rem to the United States for response costs and damages, and the amount of that liability is a maritime lien on the vessel.[8] A person otherwise liable for destruction, loss of, or injury to a sanctuary resource is not liable if he or she establishes that (1) the destruction, loss, or injury was caused solely by an act of God, an act of war, or an act or omission of a third party, and the person acted with due care; (2) the destruction, loss, or injury was caused by an activity authorized by federal or state law; or

(3) the destruction, loss, or injury was negligible.[9] However, where a vessel was intentionally grounded on a coral reef to keep it from sinking during a storm, the act-of-God defense was not available to the vessel or others sued under the Act for the resulting damage to the reef, inasmuch as it was known or should have been known that severe weather conditions were expected on the day of the incident and had been forecast as much as two days earlier.[10]

Practice Tip:

The liability provisions of the Marine Protection, Research, and Sanctuaries Act are modeled upon those of the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act, and for that reason it has been held that the strict-liability approach of those statutes should also be adopted in construing the liability provisions of the Marine Protection, Research, and Sanctuaries Act.[11]

A dredging company that hired a towing company to tow 500-foot lengths of dredge pipe was strictly liable under the National Marine Sanctuaries Act (NMSA) for destruction to the sea bottom in the Florida Keys Marine Sanctuary caused when the towing company's tugboat ran aground, where the dredging company was responsible for helping the towing company's vessels maneuver the tows and pipe rafts, and the dredging company failed to test the pipes before making the trip or to send the welder or crane operator who could have made the needed repairs.[12] Moreover, the dredging company was jointly and severally liable with the towing company under the Act, for damage to the sea bottom of the Florida Keys Marine Sanctuary caused when one of the towing company's tugboats ran aground, since each company was a legal cause of the damage, and the damage was indivisible between the two.[13] The fact that the Florida Keys Marine Sanctuary was state-owned did not preclude the United States from recovering damages under the Act for destruction of the Sanctuary's sea bottom caused by the tugboat running aground.[14]

Footnotes

1 16 U.S.C.A. §§ 1431 to 1445c-1.

2 16 U.S.C.A. § 1431.

3 16 U.S.C.A. § 1433(a).

4 16 U.S.C.A. § 1436.

5 16 U.S.C.A. § 1437(c).

6 16 U.S.C.A. § 1437(d).

7 16 U.S.C.A. § 1443(a)(1).
Seagrass is a "resource" within the meaning of this provision. U.S. v. Fisher, 977 F. Supp. 1193 (S.D. Fla. 1997), aff'd, 174 F.3d 201 (11th Cir. 1999) (noting that seagrass stabilizes the sea bottom and helps prevent erosion, provides a habitat and a refuge for numerous small invertebrates, fish, and other organisms, serves as an important base in the food chain, and helps recycle nutrients into ocean water).

8 16 U.S.C.A. § 1443(a)(2).

9 16 U.S.C.A. § 1443(a)(3).
As to acts of God, generally, see Am. Jur. 2d, Act of God §§ 1 et seq.

10 U.S. v. M/V Miss Beholden, 856 F. Supp. 668 (S.D. Fla. 1994) (also holding that liability could not be avoided on the

grounds that the destruction, loss, or injury caused by the grounding was negligible, where the evidence showed that over 1,000 meters of the coral reef were damaged by the grounding).

11 U.S. v. M/V Miss Beholden, 856 F. Supp. 668 (S.D. Fla. 1994).

12 U.S. v. Great Lakes Dredge & Dock Co., 259 F.3d 1300 (11th Cir. 2001).

13 U.S. v. Great Lakes Dredge & Dock Co., 259 F.3d 1300 (11th Cir. 2001).

14 U.S. v. Great Lakes Dredge & Dock Co., 259 F.3d 1300 (11th Cir. 2001).

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 77. National Aquaculture Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 8, 9, 12 to 16
West's Key Number Digest, Game 3.5, 4, 7 to 10

The National Aquaculture Act[1] was enacted partly in recognition of the fact that the harvest of certain species of fish and shellfish exceeds levels of optimum sustainable yield, and that the rehabilitation and enhancement of fish and shellfish resources are desirable applications of aquacultural technology.[2] The Act declares that aquaculture (generally defined by the Act as the propagation and rearing of aquatic species such as fish, mollusks, and aquatic plants in controlled or selected environments such as ocean ranching)[3] has the potential for reducing the United States trade deficit in fisheries products, augmenting existing commercial and recreational fisheries, and producing other renewable resources, thereby assisting the United States in meeting its food needs and contributing to the solution of world resource problems.[4] The Act calls for the development, by the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of the Interior, of a National Aquaculture Development Plan identifying aquatic species that the Secretaries determine to have significant potential for culturing on a commercial or other basis, and containing various recommendations for matters such as research and development, technical assistance, design and management of aquaculture facilities, and resolution of legal or regulatory constraints affecting aquaculture.[5] The Act further provides for the coordination of national activities regarding aquaculture,[6] and for the letting of contracts and the making of grants to persons or governmental agencies to carry out the purposes of the Act.[7]

Footnotes

1 16 U.S.C.A. §§ 2801 to 2810.

2 16 U.S.C.A. § 2801(1), (5).

[3] 16 U.S.C.A. § 2802(1), (3).

[4] 16 U.S.C.A. § 2801(c).

[5] 16 U.S.C.A. § 2803.

[6] 16 U.S.C.A. § 2805.

[7] 16 U.S.C.A. § 2806.

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 78. North Pacific Anadromous Stocks Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 8, 9, 12 to 16
West's Key Number Digest, Game 3.5, 4, 7 to 10

The North Pacific Anadromous Stocks Act[1] was enacted for the purpose of implementing the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean.[2] The Act provides, among other things, that it is unlawful for any person or fishing vessel subject to the jurisdiction of the United States to fish for any anadromous fish (defined by the Act with reference to the Convention)[3] in the area (generally the North Pacific Ocean) covered by the Convention,[4] or to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any anadromous fish taken or retained in violation of the Convention, the Act, or any regulation issued under the Act.[5]

The Secretary of Commerce[6] is empowered to prevent any person from violating the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the enforcement provisions of the Magnuson-Stevens Fishery Conservation and Management Act were incorporated into and made a part of and applicable to the North Pacific Anadromous Stocks Act.[7]

Footnotes

1 16 U.S.C.A. §§ 5001 to 5012.

2 16 U.S.C.A. § 5001.

3 16 U.S.C.A. § 5002(2).

4 16 U.S.C.A. § 5009(1).

[5] 16 U.S.C.A. § 5009(4).

[6] 16 U.S.C.A. § 5006(a); 16 U.S.C.A. § 1802(39).

[7] 16 U.S.C.A. § 1826g(c)(1), referring to 16 U.S.C.A. §§ 1858 to 1861.
Civil procedures for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property, see 15 C.F.R. Pt. 904 (National Oceanic and Atmospheric Administration, Department of Commerce).
As to enforcement of the Magnuson-Stevens Fishery Conservation and Management Act, see § 85.

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 79. Northwest Atlantic Fisheries Convention Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 12

Among other things, the Northwest Atlantic Fisheries Convention Act[1] makes it unlawful for any person or vessel that is subject to the jurisdiction of the United States[2]—

— to violate any regulation issued under the Act or any measure that is legally binding on the United States under the Convention.

— to refuse to permit any authorized enforcement officer to board a fishing vessel that is subject to the person's control for purposes of conducting any search, investigation, or inspection in connection with the enforcement of the Act, any regulation issued under the Act, or any measure that is legally binding on the United States under the Convention.

— forcibly to assault, resist, oppose, impede, intimidate, or interfere with any authorized enforcement officer in the conduct of any such search, investigation, or inspection.

— to resist a lawful arrest for any act prohibited by the governing statute.

— to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fishery resources taken or retained in violation of the governing statute.

— to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that the other person has committed an act prohibited by the governing statute.

The Secretary of Commerce[3] is empowered to prevent any person from violating the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the enforcement provisions of the Magnuson-Stevens Fishery Conservation and Management Act were incorporated into and made a part of and applicable to the Northwest Atlantic Fisheries Convention Act.[4]

Footnotes

[1] 16 U.S.C.A. §§ 5601 to 5610.

[2] 16 U.S.C.A. § 5606(a).

[3] 16 U.S.C.A. § 5609(15); 16 U.S.C.A. § 1802(39).

[4] 16 U.S.C.A. § 1826g(c)(1), referring to 16 U.S.C.A. §§ 1858 to 1861.
Civil procedures for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property, see 15 C.F.R. Pt. 904 (National Oceanic and Atmospheric Administration, Department of Commerce).
As to enforcement of the Magnuson-Stevens Fishery Conservation and Management Act, see § 85.

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 80. Pacific Salmon Treaty Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 12
West's Key Number Digest, Indians 366

Among other things, the Pacific Salmon Treaty Act[1] makes it unlawful for any person or vessel subject to the jurisdiction of the United States[2]—

— to violate any provision of the Act, or of any regulation adopted hereunder, or of any Fraser River Panel regulation approved by the United States under the Pacific Salmon Treaty.

— to refuse to permit any officer authorized to enforce the provisions of the Act to board a fishing vessel subject to such person's control for purposes of conducting any search, investigation, or inspection in connection with the enforcement of the Act.

— to forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any suh search, investigation, or inspection.

— to resist a lawful arrest for any act prohibited by the governing statute.

— to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of the Act.

— to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by the governing statute.

The Secretary of Commerce[3] is empowered to prevent any person from violating the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the enforcement provisions of the Magnuson-Stevens Fishery Conservation and Management Act were incorporated into and made a part of and applicable to the Pacific Salmon

Treaty Act.[4]

Footnotes

1 16 U.S.C.A. §§ 3631 to 3645.

2 16 U.S.C.A. § 3637(a).

3 16 U.S.C.A. § 3631(g); 16 U.S.C.A. § 1802(39).

4 16 U.S.C.A. § 1826g(c)(1), referring to 16 U.S.C.A. §§ 1858 to 1861.
Civil procedures for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property, see 15 C.F.R. Pt. 904 (National Oceanic and Atmospheric Administration, Department of Commerce).
As to enforcement of the Magnuson-Stevens Fishery Conservation and Management Act, see § 85.

35A Am. Jur. 2d Fish, Game, and Wildlife Conservation § 81

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 81. Tuna Conventions Act of 1950

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 12

Among other things, the Tuna Conventions Act of 1950[1] makes illegal certain fishing violations;[2] failures to keep required records, failures to stop upon being hailed, and refusals to permit inspections;[3] and certain import violations.[4] Fines are established for all such violations,[5] and all fish illegally taken or retained, or the monetary value thereof, may be forfeited.[6]

The Secretary of Commerce[7] is empowered to prevent any person from violating the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the enforcement provisions of the Magnuson-Stevens Fishery Conservation and Management Act were incorporated into and made a part of and applicable to the Tuna Conventions Act.[8]

Footnotes

1 16 U.S.C.A. §§ 951 to 962.

2 16 U.S.C.A. § 957(a).

3 16 U.S.C.A. § 957(b).

4 16 U.S.C.A. § 957(c).

5 16 U.S.C.A. § 957(d) to (f).

6 16 U.S.C.A. § 957(g).

[7] 16 U.S.C.A. § 1802(39).
The former version of 16 U.S.C.A. § 959 also made it clear that enforcement responsibility lies with the Secretary of Commerce. As amended in 2015, the statute simply cross-refers to 16 U.S.C.A. § 1826g.

[8] 16 U.S.C.A. § 1826g(c)(1), referring to 16 U.S.C.A. §§ 1858 to 1861.
Civil procedures for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property, see 15 C.F.R. Pt. 904 (National Oceanic and Atmospheric Administration, Department of Commerce).
As to enforcement of the Magnuson-Stevens Fishery Conservation and Management Act, see § 85.

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C. Protection of Fisheries and Other Marine Resources

1. In General

§ 82. Western and Central Pacific Fisheries Convention Implementation Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Fish 12, 14

The Western and Central Pacific Fisheries Convention Implementation Act[1] seeks, among other things, to minimize any disadvantage to United States fishermen in relation to other members of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.[2] Although the Western and Central Pacific Fisheries Convention Implementation Act differs from the Marine Mammal Protection Act insofar as it is not aimed specifically at protecting marine mammals, the Act addresses the depletion of fish stocks in particular areas of the western and central Pacific Ocean, and thus it too bears upon the conduct of commercial fishing vessels operating in certain areas of the high seas.[3]

The Act prohibits numerous acts related to fishing in the area subject to the Convention,[4] and provides that in the case of any fish described in such provision which are offered for entry into the United States, the Secretary of Commerce will require proof satisfactory to the Secretary that such fish is not ineligible for such entry under the terms of the Act.[5] The Secretary is empowered to prevent any person from violating the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the enforcement provisions of the Magnuson-Stevens Fishery Conservation and Management Act were incorporated into and made a part of and applicable to the Western and Central Pacific Fisheries Convention Implementation Act.[6]

Footnotes

1 16 U.S.C.A. §§ 6901 to 6910.

2 16 U.S.C.A. § 6909a(1).

[3] Pacific Ranger, LLC v. Pritzker, 211 F. Supp. 3d 196 (D.D.C. 2016).

[4] 16 U.S.C.A. § 6906(a).

[5] 16 U.S.C.A. § 6906(b), referring to 16 U.S.C.A. § 6905(a).

[6] 16 U.S.C.A. § 1826g(c)(1), referring to 16 U.S.C.A. §§ 1858 to 1861.
For purposes of 16 U.S.C.A. § 1826g(c)(1), the term "Secretary" refers to the Secretary of Commerce. 16 U.S.C.A. § 1802(39).
The assessment of a $127,000 penalty against commercial fishermen, under the Magnuson-Stevens Act, including $72,000 for violating the Western and Central Pacific Fisheries Convention Implementation Act, by setting a purse seine net near a fish aggregating device, was not arbitrary and capricious, under the Administrative Procedure Act, since the administrative law judge (ALJ) recognized that National Oceanic and Atmospheric Administration regulations and the Magnuson-Stevens Act provided a list of nonexclusive factors to guide penalty assessment, the ALJ considered those factors, and the ALJ thoroughly explained the penalties, including the crew's economic benefit from their acts and the need for future deterrence. Pacific Ranger, LLC v. Pritzker, 211 F. Supp. 3d 196 (D.D.C. 2016).
As to enforcement of the Magnuson-Stevens Fishery Conservation and Management Act, see § 85.

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35A Am. Jur. 2d Fish, Game, and Wildlife Conservation § 83

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C. Protection of Fisheries and Other Marine Resources

2. Magnuson Fishery Conservation and Management Act

§ 83. Magnuson Fishery Conservation and Management Act, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

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Validity, Construction, and Application of Magnuson Fishery Conservation and Management Act Provision Mandating Actions by the Secretary of Commerce in Connection with Fishery Regulations (16 U.S.C.A. ss1854, 1855(a) to (d)), 36 A.L.R. Fed. 2d 31

Validity, Construction, and Application of Magnuson Fishery Conservation and Management Act Provision Providing for National Standards for Fishery Conservation and Management (16 U.S.C.A. s1851), 30 A.L.R. Fed. 2d 411

Construction and Application of Magnuson Fishery Conservation and Management Act Provision Mandating Contents of Fishery Management Plans (16 U.S.C.A. s1853), 14 A.L.R. Fed. 2d 547

The Magnuson Fishery Conservation and Management Act[1] was enacted based on the congressional findings that, inter alia, (1) certain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly threatened as a consequence of increased fishing pressure, the inadequacy of fishery resource conservation and management practices and controls, or direct and indirect habitat losses which have resulted in a diminished capacity to support existing fishing levels; (2) a national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the nation's fishery resources; and (3) the collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States.[2]

The declared purposes of Congress in the Act are:

(1) to take immediate action to conserve and manage the fishery resources off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States by exercising sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone established by Presidential Proclamation 5030, dated March 10, 1983, as well as exclusive fishery management authority beyond the exclusive economic zone over such anadromous species and Continental Shelf fishery resources;[3]
(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;[4]
(3) to promote domestic commercial and recreational fishing under sound conservation and management principles including the promotion of catch and release programs in recreational fishing;[5]
(4) to provide for the preparation and implementation in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;[6]
(5) to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such plans under circumstances which will enable the states, the fishing industry, consumer and environmental organizations and other interested persons to participate in, and advise on, the establishment and administration of such plans, and which will take into account the social and economic needs of the states;[7]

(6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end to ensure that optimum yield determinations promote such development in a nonwasteful manner;[8] and
(7) to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.[9]

The section of the Magnuson-Stevens Fishery Conservation and Management Act requiring that fishery management plans describe and identify essential fish habitat for the fishery, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat, would apply only to the formulation of a fishery management plan, rather than to the framework adjustments of a plan already in place.[10]

The closure of Florida fisheries, in a highly migratory species fishery management plan promulgated pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, did not violate the requirement that the plan prevent overfishing while achieving optimum yield from each fishery; optimum yield was to be achieved over the long run, not precisely each year, and studies led the National Marine Fisheries Service (NMFS) to conclude that the closure's effects would fall between the effort redistribution model and the no redistribution of effort model.[11]

The Department of Commerce regulation imposing coastwide, rather than state-by-state, summer commercial fishing quota for scup in the Atlantic Coast fishery was justified under the Magnuson-Stevens Fishery Conservation and Management Act as a conservation measure to counteract the inimical effects of well-documented overfishing, even if the coastwide quota encouraged a "derby-style" summer fishing season, where the state-by-state allocations were ignored by the states and subsequently invalidated by the court.[12]

The National Marine Fisheries Service rule suspending nonquota commercial management measures for large coastal shark stocks in the Atlantic Ocean and the Gulf of Mexico did not violate the by catch accounting and minimization provisions of the Magnuson-Stevens Fishery Conservation and Management Act, even though some independent reviewers generally agreed with the idea of minimum sizes and counting dead discards, where the measures adopted were not supported by available data.[13]

The entry of a zone closed to fishing by the National Marine Fisheries Service for the purpose of removing stray fishing gear does not constitute a "good faith" exception to strict liability under the Magnuson-Stevens Act for violating closure regulations.[14]

Footnotes

[1] 16 U.S.C.A. §§ 1801 to 1891d.

[2] 16 U.S.C.A. § 1801(a).

[3] 16 U.S.C.A. § 1801(b)(1).

[4] 16 U.S.C.A. § 1801(b)(2).

[5] 16 U.S.C.A. § 1801(b)(3).

[6] 16 U.S.C.A. § 1801(b)(4).
The national standards for fishery conservation and management are set forth in 16 U.S.C.A. § 1851.
The required contents of fishery management plans are set forth in 16 U.S.C.A. § 1853.
Management measures which relied upon a prior year's analysis were not inconsistent with the "national standard" under the Magnuson-Stevens Fishery Conservation and Management Act which required that the "importance of fishery resources to fishing communities" be taken into account in the implementation of Pacific Plan's 35,000 natural spawner escapement floor, where the agency appropriately updated its analysis, the Secretary of the Department of Commerce examined the impact of, and alternatives to, the plan he ultimately adopted, and no missing data had been identified. Oregon Trollers Ass'n v. Gutierrez, 452 F.3d 1104 (9th Cir. 2006).

[7] 16 U.S.C.A. § 1801(b)(5).

[8] 16 U.S.C.A. § 1801(b)(6).

[9] 16 U.S.C.A. § 1801(b)(7).

[10] Conservation Law Foundation v. U.S. Dept. of Commerce, 229 F. Supp. 2d 29 (D. Mass. 2002), judgment aff'd, 360 F.3d 21, 14 A.L.R.6th 853 (1st Cir. 2004).

[11] National Coalition For Marine Conservation v. Evans, 231 F. Supp. 2d 119 (D.D.C. 2002).

[12] State of New York v. Evans, 162 F. Supp. 2d 161 (E.D. N.Y. 2001).

[13] Ocean Conservancy v. Evans, 260 F. Supp. 2d 1162 (M.D. Fla. 2003).

[14] Roche v. Evans, 249 F. Supp. 2d 47 (D. Mass. 2003) (holding that the fine of $20,000 levied against a fisherman under the Magnuson-Stevens Act for entering a zone closed to fishing by the National Marine Fisheries Service bore a relationship to the gravity of the offense, and thus was not excessive, as would violate the Eighth Amendment, where the penalty imposed was well within the statutory range, and the fine was actually reduced from $35,000, based upon the fisherman's degree of culpability, ability to pay, and all pertinent factual circumstances of violation).

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IV. Federal Wildlife Conservation and Protection Acts

C. Protection of Fisheries and Other Marine Resources

2. Magnuson Fishery Conservation and Management Act

§ 84. State and federal authority under Magnuson Fishery Conservation and Management Act

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West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

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Preemption of State and Local Regulations by Magnuson Fishery Conservation and Management Act (16 U.S.C.A. ss1801 to 1883), 31 A.L.R. Fed. 2d 337

The Magnuson-Stevens Fishery Conservation and Management Act was enacted to establish a federal-regional partnership to manage fishery resources.[1] Thus, the National Marine Fisheries Service's regulation removing three historic net fishing areas in Alaska from a salmon fishery management plan was not authorized under the Magnuson-Stevens Act, since the Act's unambiguous language requires a regional fishery management council to create a management plan for each fishery under its authority which requires conservation and management, and to delegate authority over a federal fishery to a state only expressly in a management plan; the Act makes it plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns.[2]

State jurisdiction is defined explicitly under the Magnuson-Stevens Act.[3]

A state's Shark Fin Law, making it unlawful to possess, sell, offer for sale, trade, or distribute a shark fin in the state, was not preempted by the Magnuson-Stevens Act, under which the federal government has exclusive fishery management authority over all fish from the exclusive economic zone (EEZ); the state statute restricted certain economically viable uses for sharks lawfully harvested from the EEZ, but the Act did not mandate that a given quantity of sharks be harvested, the objective of the Act's provisions addressing shark finning was conservation, and the Act was cooperative with state schemes and expressly preserved the ability of states to regulate fishing-related activities within their boundaries.[4]

Footnotes

1 Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015).

2 United Cook Inlet Drift Association v. National Marine Fisheries Service, 837 F.3d 1055 (9th Cir. 2016).

3 16 U.S.C.A. § 1856.

4 Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015).

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C. Protection of Fisheries and Other Marine Resources

2. Magnuson Fishery Conservation and Management Act

§ 85. Enforcement of Magnuson Fishery Conservation and Management Act

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Fish 8 to 10

The Magnuson Fishery Conservation and Management Act's enforcement provisions authorize the imposition of civil penalties and permit sanctions,[1] criminalize certain violations of the Act,[2] and provide for civil forfeiture proceedings against fishing vessels used and fish taken or retained in violation of the Act.[3]

Certain powers are conferred on federal officials in order that they may enforce the Act's provisions.[4]

Footnotes

1 16 U.S.C.A. § 1858.

2 16 U.S.C.A. § 1859.

3 16 U.S.C.A. § 1860.

4 16 U.S.C.A. § 1861.
Civil procedures for assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property, see 15 C.F.R. Pt. 904 (National Oceanic and Atmospheric Administration, Department of Commerce).

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IV. Federal Wildlife Conservation and Protection Acts

C. Protection of Fisheries and Other Marine Resources

2. Magnuson Fishery Conservation and Management Act

§ 86. Judicial review of regulations and certain actions under Magnuson Fishery Conservation and Management Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Fish 8 to 10

The Magnuson-Stevens Fishery Conservation and Management Act provides, subject to certain limitations, that regulations promulgated thereunder, as well as certain actions, are subject to judicial review to the extent authorized by, and in accordance with, the Administrative Procedure Act, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable.[1] The actions in question are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.[2] An e-mail notification, setting forth the date on which commercial fishermen will be required to pay for costs associated with at-sea monitors as set forth in National Marine Fisheries Service's regulation, is not a separately reviewable agency "action" within the meaning of the 30-day limitations period for judicial review of actions taken under regulations implementing fishery management plans, where the e-mail was not published in the Federal Register and was not the product of agency adjudication, but was one of several updates sent to regulated parties in effort to keep fishing sectors abreast of developments relating to the Service's final rule.[3]

The provision of the Magnuson-Stevens Act allowing for judicial review of regulations promulgated thereunder and actions taken pursuant to regulations implementing a fishery management plan did not waive the United States' sovereign immunity with respect to a challenge to the composition of a regional fishery management council created pursuant to the Act.[4] Also, the United States' sovereign immunity was not waived, so as to permit a challenge to the composition of a regional fishery management council created pursuant to the Magnuson-Stevens Act, by the statute granting federal district courts exclusive jurisdiction over any case or controversy arising under the Act's provisions.[5]

The judicial review provision of the Magnuson-Stevens Act excludes review pursuant to the Administrative Procedure Act provision giving courts the authority to compel agency action unlawfully withheld, as the review provision states[6] that a reviewing court "shall only set aside" regulations and actions that are arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.[7]

Footnotes

1 16 U.S.C.A. § 1855(f)(1).

2 16 U.S.C.A. § 1855(f)(2).

3 Goethel v. U.S. Department of Commerce, 854 F.3d 106 (1st Cir. 2017).

4 Delta Commercial Fisheries Ass'n v. Gulf of Mexico Fishery Management Council, 259 F. Supp. 2d 511 (E.D. La. 2003), aff'd, 364 F.3d 269 (5th Cir. 2004).

5 Delta Commercial Fisheries Ass'n v. Gulf of Mexico Fishery Management Council, 259 F. Supp. 2d 511 (E.D. La. 2003), aff'd, 364 F.3d 269 (5th Cir. 2004).

6 16 U.S.C.A. § 1855(f)(1)(B).

7 Anglers Conservation Network v. Pritzker, 809 F.3d 664 (D.C. Cir. 2016).

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D. Protection of Birds

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West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551, 652, 749

West's Key Number Digest, Fish 8, 9, 12 to 16
West's Key Number Digest, Game 3.5, 4, 7 to 10
West's Key Number Digest, Indians 351

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A.L.R. Index, Birds
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A.L.R. Index, Fish and Game
A.L.R. Index, Wildlife
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D. Protection of Birds

§ 87. Bald and Golden Eagle Protection Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551, 749

West's Key Number Digest, Game 3.5, 4, 7 to 10
West's Key Number Digest, Indians 351

The Bald and Golden Eagle Protection Act[1] generally prohibits the taking, possession, sale, purchase, barter of bald or golden eagles or parts thereof, except as permitted by the Secretary of the Interior.[2] Whenever, after investigation, the Secretary determines that it is compatible with the preservation of bald or golden eagles to permit their taking, possession, or transportation for scientific or exhibition purposes of public museums, scientific societies, and zoological parks, for the religious purposes of Indian tribes, or for the protection of wildlife or of agricultural or other interests in any particular locality, the Secretary may authorize their taking pursuant to regulations he or she is authorized to prescribe.[3] The Act abrogates the rights of Indians to take bald and golden eagles pursuant to previous treaties between Indians and the United States.[4] The Act's general prohibition against the possession of eagle parts has been held not to violate the right to the free exercise of religion by persons practicing Indian religions and asserting the importance of eagle parts to their religious practices.[5]

Observation:

The Act, by allowing for exemptions to permit Indians to use eagle feathers for religious purposes but containing no such allowance for such use by persons who are not Indians, does not violate the Establishment Clause of the First Amendment, inasmuch as the exemption for Indians is rationally related to the legitimate government interests of protecting Indian religion and culture and protecting the eagle population.[6]

The Act provides for civil[7] and criminal[8] penalties for its violation, and illegally possessed eagles or parts thereof are subject to forfeiture under the Act.[9]

Practice Tip:

A person whose conduct violates both the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act[10] may be prosecuted under either statute.[11]

Because it would have been futile for claimants, who were not members of a federally recognized tribe but practiced a Native American religion, to apply for permits to possess bald and golden eagle feathers, claimants, who were charged with possessing eagle feathers without a permit, had standing to challenge the statutory and regulatory scheme for obtaining a permit, despite the fact that they did not apply for permits.[12]

Footnotes

1 16 U.S.C.A. §§ 668 to 668d.

2 16 U.S.C.A. § 668.

3 16 U.S.C.A. § 668a.

4 U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986).

5 U.S. v. Hugs, 109 F.3d 1375 (9th Cir. 1997); U.S. v. Lundquist, 932 F. Supp. 1237 (D. Or. 1996).
The federal government has a compelling interest in protecting bald and golden eagles, as required under the Religious Freedom Restoration Act to support the burden on non-Native American practitioners of Native American religions that is imposed by the Bald and Golden Eagle Protection Act, which criminalizes possession of eagle feathers without a permit that is available only to members of federally recognized tribes; the bald eagle is the national symbol, and the bald eagle's survival is intimately intertwined with that of the golden eagle, as the young of the two species are easily confused. U.S. v. Wilgus, 638 F.3d 1274 (10th Cir. 2011).

6 Rupert v. Director, U.S. Fish and Wildlife Service, 957 F.2d 32 (1st Cir. 1992).

7 16 U.S.C.A. § 668(b).

8 16 U.S.C.A. § 668(a).
Any substitute estimates of loss employed by the sentencing court, after determining that there is no reasonably available information to determine the fair-market retail price of a bald eagle that defendant has been convicted of killing, must be reasonable and based on reliable information. U.S. v. Bertucci, 794 F.3d 925 (8th Cir. 2015).

9 16 U.S.C.A. § 668b(b).

10 As to the Migratory Bird Treaty Act, see §§ 88 to 90.

11 § 88.
A defendant's Fifth Amendment property right to just compensation was not violated by his convictions under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act, prohibiting of the sale of lawfully acquired bird parts, where the defendant was paid $12,000 for the sale of feathered Native American artifacts by the buyer, and the district court refused to order the defendant to return the money. U.S. v. Kornwolf, 276 F.3d 1014 (8th Cir. 2002).

[12] U.S. v. Hardman, 297 F.3d 1116 (10th Cir. 2002).

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§ 88. Migratory Bird Treaty Act

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West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Game 3.5, 4, 7 to 10

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Validity, Construction, and Application of Migratory Bird Treaty Act, 16 U.S.C.A. secs 703 to 712, and its Implementing Regulations, 3 A.L.R. Fed. 2d 465

The Migratory Bird Treaty Act[1] generally prohibits the taking,[2] killing, or possession of any migratory bird or any part, nest, or egg of such bird, included in the terms of various specified conventions between the United States and other nations.[3] The Secretary of the Interior is authorized, subject to the provisions of those conventions, to determine whether and to what extent acts otherwise prohibited by the Act may be permitted, and to adopt appropriate regulations governing the same.[4]

The Act provides for criminal penalties for its violation, and for the forfeiture of guns, traps, nets and other equipment, vessels, vehicles, and other methods of transportation used by any person engaging in acts prohibited by the Act.[5] The criminal penalties under the Act present two factual scenarios for dealing with persons who hunt migratory birds in violation of the Act: if the actor hunts for pleasure, the violation is a misdemeanor, while if he or she hunts for commercial purposes, he or she is guilty of a felony.[6] The felony provisions of the Act were intended to provide a more severe penalty for market hunters who commercialize the destruction of migratory birds.[7]

Observation:

Neither the Migratory Bird Treaty Act nor the regulations implementing it preempt state regulations pertaining to captive-reared

mallard duck permits.[8]

A misdemeanor violation of the Migratory Bird Treaty Act for taking or killing of migratory birds is a strict-liability crime.[9] For instance, the possession of migratory game birds exceeding the daily bag limit, in violation of the Migratory Bird Treaty Act and its attendant regulations, is a strict-liability offense.[10] There is no scienter requirement for a felony violation of the Act either, and this does not render the Act unconstitutional.[11]

An indictment charging the defendant with receiving or possession of a migratory game bird without the required tag was not deficient for failing to define "migratory bird preservation facility," where the language in the indictment tracked the requirements of the statutes at issue, and the failure to define "migratory bird preservation facility" or to cite to where that definition could be found was immaterial.[12]

Practice Tip:

A person whose conduct violates both the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act[13] may be prosecuted under either statute.[14]

A defendant charged with violating the Migratory Bird Treaty Act by selling or offering for sale birds within the scope of the Act may not raise as a defense the contention that such birds are or have become so abundant that they no longer require statutory protection.[15]

Evidence that an agent from the state department of wildlife and fisheries discovered eight ducks in the hunter's pirogue, which exceeded the daily bag limit by two, was sufficient to support the hunter's conviction for possessing migratory game birds exceeding the daily bag limit in violation of the Migratory Bird Treaty Act (MBTA), despite the hunter's assertion that he did not intend to violate the bag limit and that his dog had picked up birds that had drifted from other hunters.[16] Also, evidence of the sale prices of Harlequin duck skins and mounts, as contrasted with the prices of other bird mounts sold by the defendant, was admissible, in a prosecution for shooting and selling the duck in violation of the Migratory Bird Treaty Act, as evidence that the higher price for the Harlequin duck reflected the actual charge for the bird, above and beyond the reasonable charge for taxidermy services.[17]

Observation:

In addition to the criminal enforcement remedies provided by the Act itself, the federal or state governments may recover damages for killed migratory waterfowl under either the public trust or parens patriae doctrines.[18]

Footnotes

1 16 U.S.C.A. §§ 703 to 712.

2 16 U.S.C.A. § 703.
The commercial activity of a petroleum corporation unintentionally and indirectly causing migratory bird deaths was not a "taking" of migratory birds under the Migratory Bird Treaty Act. U.S. v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015).
The Migratory Bird Treaty Act prohibition against pursuing, hunting, taking, capturing, or killing migratory bird or any part of its nest or egg, did not prohibit the National Park Service from cutting down migratory birds' nesting trees at a former military base; habitat modification, even if it indirectly disturbed migratory birds, did not amount to a "taking" under the Act. City of Sausalito v. O'Neill, 386 F.3d 1186 (9th Cir. 2004).

3 16 U.S.C.A. § 703.
A Department of the Interior opinion that interpreted the Migratory Bird Treaty Act (MBTA) to permit the incidental taking, or killing, of migratory birds was not entitled to *Skidmore* deference, as the opinion was a recent and sudden departure from long-held agency positions backed by over 40 years of consistent enforcement practices, ran counter to the purpose of MBTA to protect migratory bird populations, and was an informal pronouncement lacking notice-and-comment or other protective rulemaking procedure, and the opinion's claim to agency expertise was at best questionable, as there was no evidence of input from the Fish and Wildlife Services, the agency actually tasked with implementing the MBTA. Natural Resources Defense Council, Inc. v. U.S. Department of the Interior, 2020 WL 4605235 (S.D. N.Y. 2020).

4 16 U.S.C.A. § 704(a).
The Migratory Bird Treaty Act, as amended by Migratory Bird Treaty Reform Act, unambiguously excluded nonnative birds from protection, and therefore, the mute swan, which was not native to North America and had been introduced to the continent by humans, was not a protected species under the Act. Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872 (D.C. Cir. 2006).

5 16 U.S.C.A. § 707.
The Migratory Bird Treaty Act, which criminalized a range of conduct that would lead to death or captivity of protected migratory birds, including to pursue, hunt, take, capture, and kill, was not unconstitutionally vague; the Act's language did not encourage arbitrary enforcement, and the terms were capable of definition without turning to the subjective judgment of government officers. U.S. v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

6 U.S. v. Engler, 806 F.2d 425, 21 Fed. R. Evid. Serv. 1398 (3d Cir. 1986).
Defendants' sale of a fan made of migratory bird feathers was not the sale of a "migratory bird" within the meaning of the Migratory Bird Treaty Act provision making it a felony to take any migratory bird with the intent to sell, offer for sale, barter, or offer to barter such bird, or to sell, offer for sale, barter, or offer to barter any migratory bird; Congress intended for the sale of a product containing migratory bird feathers to be a misdemeanor under the Act. U.S. v. Vance Crooked Arm, 788 F.3d 1065 (9th Cir. 2015).

7 U.S. v. St. Pierre, 578 F. Supp. 1424 (D.S.D. 1983).

8 Noe v. Henderson, 373 F. Supp. 2d 939 (E.D. Ark. 2005), order aff'd, 456 F.3d 868 (8th Cir. 2006).

9 U.S. v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010) (it was not necessary to prove that defendants violated the Act with specific intent or guilty knowledge when dead migratory birds were discovered lodged in a piece of oil drilling equipment).

10 U.S. v. Morgan, 311 F.3d 611, 3 A.L.R. Fed. 2d 773 (5th Cir. 2002) (a hunter's conduct of keeping birds in excess of the bag limit that his dog has picked up from other hunters, in violation of the Act, is not justified by the hunter's alleged belief that if he leaves the other hunters' birds in the water, he will be committing "wanton waste" in violation of an implementing regulation, as the regulation concerning wanton waste does not apply to an individual who leaves a bird he or she did not shoot).

11 U.S. v. Engler, 806 F.2d 425, 21 Fed. R. Evid. Serv. 1398 (3d Cir. 1986).

12 U.S. v. Gilkerson, 556 F.3d 854 (8th Cir. 2009) (stating that an individual may be a "migratory bird preservation

facility" for purposes of criminal liability under the Migratory Bird Treaty Act).

13 As to the Bald and Golden Eagle Protection Act, see § 87.

14 U.S. v. Mackie, 681 F.2d 1121 (9th Cir. 1982).

15 U.S. v. Gigstead, 528 F.2d 314 (8th Cir. 1976).

16 U.S. v. Morgan, 311 F.3d 611, 3 A.L.R. Fed. 2d 773 (5th Cir. 2002).

17 U.S. v. Pitrone, 115 F.3d 1 (1st Cir. 1997).

18 Complaint of Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980).

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D. Protection of Birds

§ 89. Migratory Bird Treaty Act—Prohibition against taking birds by baiting

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Environmental Law 511 to 551

West's Key Number Digest, Game 3.5, 4, 7 to 10

It is unlawful under the Migratory Bird Treaty Act for any person to (1) take any migratory game bird by the aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area; or (2) place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on or over the baited area.[1]

It has been held that a criminal conviction for violation of the hunting prohibition requires no proof of any connection between the defendant and the presence of the bait, or proof that the defendant was aware of the presence of the bait.[2] Other authority, however, states that the prohibiting of hunting with the aid of baiting contemplates that the hunter have some part directly or indirectly in the baiting, or that it is done for his or her benefit as a part of a hunting method, and that the acts of third parties totally independent of the hunter are not included in the scope of the law.[3] Another line of authority states that conviction for hunting in a baited area requires proof that the bait was situated such that its presence could reasonably have been ascertained by a hunter wishing to check the area for illegal devices.[4] In this vein, it has been held that defendants charged with taking migratory birds by aid of bait had a duty to conduct a reasonable inspection of the field.[5]

Observation:

The government's enforcement of the Migratory Bird Treaty Act provisions prohibiting the shooting of migratory game birds over a baited area did not implicate a protected liberty or property interest of hunters who sought to shoot migratory birds on private property adjacent to a wildlife refuge.[6]

In the prosecution of a farmer for baiting a field for the purpose of hunting migratory birds, the government is required to prove that the defendant placed or directed the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on or over the baited area.[7]

Caution:

An "agricultural practice exception" in the regulations implementing the Act allows the taking of any migratory game bird on or over standing crops or flooded standing crops (including aquatics); standing, flooded, or manipulated natural vegetation; flooded harvested croplands; or lands or areas where seeds or grains have been scattered solely as the result of a normal agricultural planting, harvesting, postharvest manipulation, rice ratooning, postdisaster flooding, or normal soil stabilization practice.[8] However, this exception does not apply to unlawful baiting, and thus cannot immunize a defendant's conduct in unlawfully baiting migratory birds.[9]

Footnotes

1 16 U.S.C.A. § 704(b).

2 U.S. v. Chandler, 753 F.2d 360 (4th Cir. 1985); U.S. v. Manning, 787 F.2d 431 (8th Cir. 1986).

3 Allen v. Merovka, 382 F.2d 589 (10th Cir. 1967).

4 U.S. v. Lee, 217 F.3d 284 (5th Cir. 2000).
As adopting this rule for the enforcement of a similar state prohibition against hunting in baited areas, see Ex parte Phillips, 771 So. 2d 1066 (Ala. 2000).

5 U.S. v. Andrus, 383 Fed. Appx. 481 (5th Cir. 2010).

6 Johnson v. U.S. Dept. of Interior, 185 F. Supp. 2d 713 (W.D. Ky. 2001).

7 U.S. v. Cathey, 619 Fed. Appx. 207 (4th Cir. 2015).

8 50 C.F.R. § 20.21(i)(1).

9 United States v. Obendorf, 894 F.3d 1094 (9th Cir. 2018).

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